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# Antitrust Implications of Agricultural Cooperatives

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# Antitrust Implications of Agricultural Cooperatives

## INTRODUCTION

The cooperative<sup>1</sup> has experienced a long history in the United States<sup>2</sup> and Great Britain.<sup>3</sup> In the United States, its origin can

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<sup>1</sup> A[n agricultural] cooperative . . . is basically an association organized . . . for the purpose of marketing products produced . . . [by] its members, or purchasing supplies used by its members . . . . Characteristically, they are non-profit. Their objectives are to help their members obtain the best price for their products or effect important savings in the purchase of . . . supplies.

Recent Developments, *The Agricultural Cooperative Antitrust Exemption*—Fairdale Farms, Inc. v. Yankee Milk, Inc., 67 CORNELL L. REV. 396, 396 n.3 (1981-82) (quoting Noakes, *Exemption for Cooperatives*, 19 A.B.A. ANTITRUST SECTION 407, 409 (1961)).

<sup>2</sup> See Mischler, *Agricultural Cooperative Law*, 30 ROCKY MTN. L. REV. 381, 381-82 (1957-58). In 1752, Benjamin Franklin organized a mutual fire insurance company. Connecticut dairy farmers organized a cooperative marketing association in 1804. The Mormons had cooperative irrigation societies, cooperative stores, and other forms of cooperation. J. VOORHIS, *COOPERATIVE ENTERPRISE: PEOPLE'S CHANCE IN A WORLD OF BIGNESS* 83, 194 (1975).

<sup>3</sup> The Rochdale pioneers, who contributed the principles of cooperatives, "established the first permanent cooperative in England in 1844." M. ABRAHAMSEN, *COOPERATIVE BUSINESS ENTERPRISE* 47 (1976). In 1860, the Rochdale Society instituted what are commonly referred to as the Rochdale principles:

1. Members should provide their own capital that earned a fixed return.
2. Only the best goods should be supplied to members.
3. Full weight and measure should be given.
4. Market price should be charged.
5. No credit should be given.
6. Profits should be divided *pro rata* by the amount of each member's purchases.
7. Each member should have only one vote.
8. Members may be male or female.
9. Periodically elected officers and committees should manage the cooperative.
10. A percentage of the profits should be allotted to education.
11. Members should receive frequent statements and balance sheets.

See *id.* at 48. The Society developed these principles over a 16-year period on a trial-and-error basis while operating a small consumer cooperative. This explains the disagreement among scholars concerning the principles' wording, number, and time of development. *Id.* Though the Rochdale principles have evolved, some of the basic ideas remain. See *id.* at 50; Mischler, *supra* note 2, at 382 n.5. For a discussion of the origin of the Rochdale principles and their application today see M. ABRAHAMSEN, *supra*, at 48-50.

be traced to the National Grange movement.<sup>4</sup> Even before the Grange movement, cooperation among farmers had been a notable characteristic of farm life.<sup>5</sup> Following the Grange movement, use of the agricultural cooperative as a form of business association grew.<sup>6</sup> To protect agricultural cooperatives from federal antitrust laws, in 1914 Congress exempted noncapital stock farmer cooperatives from the scope of these laws<sup>7</sup> by enacting

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<sup>4</sup> From 1871 to 1876, more than 20,000 local Granges were established. The Grange was an early form of farm cooperative that operated on an informal basis to buy and sell for its members. In 1874, the National Grange adopted the Rochdale principles and, although the movement ultimately declined, it demonstrated that these principles "offered the most promising basis for sound cooperative efforts." Mischler, *supra* note 2, at 381-82. See also Frost v. Corporation Comm'n of Okla., 278 U.S. 515, 538 (1929) (Brandeis, J., dissenting); Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341, 341 (1975).

<sup>5</sup> The beginning of agriculture would have been impossible without cooperation among farmers. No individual farmer could defend the crops against nomadic tribes, but when all farmers in a region joined together, they could successfully farm. In the United States, the pioneers helped their neighbors build homes and farm buildings. They also joined together to defend against attack and to care for the ill. See J. VOORHIS, *supra* note 2, at 194. But see Mischler, *supra* note 2, at 381, where it is stated that before 1870, farms were generally isolated and dispersed economic units; farmers put produce on the market in competition with each other; they had inadequate storage, financing and knowledge of market conditions; and their purchasers were much more concentrated.

Massachusetts enacted the first farmer cooperative statute in 1866. By 1928, only two states did not provide for incorporation of agricultural cooperatives. See Frost v. Corporation Comm'n of Okla., 278 U.S. at 539-40 (Brandeis, J., dissenting).

<sup>6</sup> During this century, farmers have increasingly used the cooperative form of business association because of a belief that it is well suited to the economic and social needs of the family farm. See Mischler, *supra* note 2, at 381. In the late 1800s, as commodities became easier to transport and farmers became more aware of the competitive market, farmers began to organize cooperatives. Noakes, *Agricultural Cooperatives*, 33 A.B.A. ANTITRUST L.J. 7, 7-8 (1967). Some early cooperatives began with the goal of handling the entire output of specific crops in a region so that the farmer might receive a higher price; however, these cooperative efforts were limited by the fact that they could not control supply. See Mischler, *supra* note 2, at 382.

After the Grange movement, state and federal antitrust laws delayed cooperative growth. See Note, *supra* note 4, at 341 & n.3. By the 1920s, however, there were approximately 12,000 marketing associations and 2,000 farm supply associations. See Mischler, *supra* note 2, at 382. For general discussions of the effect of state antitrust law on cooperative growth and the subsequent state antitrust exemptions for cooperatives, see FARMERS COOPERATIVE SERVICE, U.S. DEP'T OF AGRICULTURE, LEGAL PHASES OF FARMER COOPERATIVES 265-75 (1977) [hereinafter cited as LEGAL PHASES]. See also Recent Developments, *supra* note 1, at 398 n.11.

<sup>7</sup> "Based upon common law abhorrence of business restraints, such laws have no inherent exceptions. If an activity is to be conducted outside the scope of the antitrust laws, it must be done on the basis of a specific exemption. Antitrust immunity is not

section 6 of the Clayton Act.<sup>8</sup> Eight years later, with the enactment of the Capper-Volstead Act, Congress extended this immunity to capital stock cooperatives engaged in collective marketing, handling and processing.<sup>9</sup>

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lightly implied." Comment, *Agricultural Cooperatives and the Antitrust Laws*, 43 NEB. L. REV. 73, 73 (1963-64). See generally Recent Developments, *supra* note 1, at 396 n.2 (providing a brief discussion of the nature and rationale for various antitrust exemptions).

<sup>8</sup> Section six of the Clayton Act provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Clayton Act § 6, 15 U.S.C. § 17 (1982) (original version at ch. 323, § 6, 38 Stat. 730, 731 (1914)). See generally Saunders, *The Status of Agricultural Cooperatives Under the Antitrust Laws*, 20 FED. B.J. 35, 43 n.33 (1960) (discussing the rationale for the Clayton Act § 6 distinction between labor unions and agricultural cooperatives).

<sup>9</sup> The first two sections of the Capper-Volstead Act provide:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve . . . a complaint . . . [and] a notice of hearing . . . requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. . . . If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price

After the enactment of the Sherman Act,<sup>10</sup> farmers who organized into a cooperative were technically within the scope of that Act since joint pricing and marketing of products in-

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of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade.

Capper-Volstead Act §§ 1-2, 7 U.S.C. §§ 291-92 (1982) (original version at ch. 57, §§ 1-2, 42 Stat. 388, 388 (1922)). If a cooperative doing business in interstate commerce does not qualify for either Clayton Act or Capper-Volstead Act immunity, the federal antitrust laws continue to apply. LEGAL PHASES, *supra* note 6, at 275.

There were several reasons prompting passage of the Capper-Volstead Act as a supplement to § 6 of the Clayton Act. Stock cooperatives were unsure of the application of the antitrust laws to them. Non-stock cooperatives believed the statutory immunity and its judicial interpretation were too narrow. There was also a belief that some limit should exist on the cooperative's ability to increase food prices. See Lemon, *Antitrust and Agricultural Cooperatives Collective Bargaining in the Sale of Agricultural Products*, 44 N.D.L. REV. 505, 506 & nn. 11-12 (1967-68) [hereinafter cited as *Antitrust and Agricultural Cooperatives*]; Note, *Agricultural Cooperatives and the Search for Parity—A Confrontation with the Antitrust Laws*, 44 N.D.L. REV. 525, 529 (1967-68). Section 6 of the Clayton Act did not recognize a basic distinction between unions and cooperatives—the need for equity financing by cooperatives. Congress passed the Capper-Volstead Act to remedy this oversight and to allow cooperatives to organize as corporate entities but with qualifications to ensure they would continue to act like cooperatives. Lemon, *The Capper-Volstead Act—Will It Ever Grow Up?*, 22 ADMIN. L. REV. 443, 444 (1969-70) [hereinafter cited as *The Capper-Volstead Act*]. Section 6 failed to list the activities that a cooperative could perform legitimately. Recent Developments, *supra* note 1, at 400. Additionally, Congress hoped that the Capper-Volstead Act would rescue farmers from hardship caused by the decreasing price of produce and the increasing cost of input. See Comment, *supra* note 7, at 77 n.15, 78 nn.17-18 (concerning the 1920 version of the Capper-Volstead Act). Farmers had experienced competitive pressures and the resulting adverse economic effects from the loss of European export markets. See Noakes, *supra* note 6, at 8.

Before Congress passed the Capper-Volstead Act, there were several attempts to pass similar legislation. See generally 51 CONG. REC. 9246-47 (1914) (statement of Rep. McDonald) (history of congressional attempts to legislate labor and agricultural exemptions to the Sherman Act); Recent Developments, *supra* note 1, at 400 n.25 (discussing attempts to pass earlier version of the Capper-Volstead Act and areas of disagreement between the two houses of Congress).

Today, because most cooperatives are organized as corporations, the Capper-Volstead Act is the more important exemption. See Mahaffie, *Cooperative Exemptions Under the Antitrust Laws: A Prosecutor's View*, 22 ADMIN. L. REV. 435, 436 (1969-70). But cf. *The Capper-Volstead Act*, *supra*, at 445 ("[T]he more proper view is that the Clayton Act provides the exemption for cooperatives and the Capper Volstead Act, in authorizing various business practices, says that it is permissible for exempt cooperatives to issue stock.").

<sup>10</sup> See 15 U.S.C. §§ 1-7 (1982) (original version at ch. 647, §§ 1-7, 26 Stat. 209-10 (1890)). Congress defeated an amendment to the Sherman Act which would have exempted agricultural cooperatives. See note 207 *infra* and accompanying text.

volves the elimination of competition.<sup>11</sup> Though the "rule of reason" may have prevented application of the Sherman Act to farmer associations, Congress passed section 6 of the Clayton Act ensuring that agricultural cooperatives would not be considered a combination in restraint of trade.<sup>12</sup> Two policy considerations induced the enactment of both section 6 of the Clayton Act and the Capper-Volstead Act: the vicissitudes of agriculture and the relative weakness of the individual farmer's bargaining power in the agricultural market.<sup>13</sup> Although their scope has been litigated vigorously,<sup>14</sup> these two exemptions have enabled

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<sup>11</sup> See Saunders, *supra* note 8, at 36. Ironically, farmers were one group which strongly supported the Sherman Act since they were vulnerable to industry's monopolistic practices. See *Tigner v. Texas*, 310 U.S. 141, 145 (1940). When the Sherman Act was enacted, Congress was concerned that the Act would prohibit farmer associations. Congress' fears may have been well-founded since the Supreme Court indicated that cooperatives fell within the scope of the Sherman Act. "The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers . . . from the operation of the Act and that all these efforts failed, so that the Act remained as we have it before us." *Loewe v. Lawlor*, 208 U.S. 274, 301 (1908) (dictum).

<sup>12</sup> See *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 506.

<sup>13</sup> See 61 CONG. REC. 2058 (1922) (statement of Sen. Capper); Saunders, *supra* note 8, at 36. The bargaining strength of the big processor or packer as compared with that of the individual farmer remains a fundamental rationale for antitrust protection for bargaining associations. See *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 511. This factor is also responsible for other farmer legislation. See The Cooperative Marketing Act of 1926, 7 U.S.C. §§ 451-57 (1982) (authorizing the acquisition and exchange of market information by farmers and their cooperatives); Agricultural Adjustment Act of 1933, 7 U.S.C. § 608b (1982) (allowing issuance of marketing agreements and marketing orders by the Secretary of Agriculture without violating the antitrust laws); The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 671 (1982) (arbitration meetings and agreements authorized by the Secretary of Agriculture and exempted from the antitrust laws); The Robinson-Patman Act § 4, 15 U.S.C. § 13b (1982) (permitting cooperatives to return to their members either patron refunds or dividends without violation of the Act's provisions); 15 U.S.C. § 18 (1982) (original version at ch. 323, § 7, 38 Stat. 730, 731-32 (1914)) (amended § 7 of the Clayton Act so that it shall not apply to "transactions duly consummated pursuant to authority given by . . . Secretary of Agriculture under any statutory provision vesting such power in . . . [the] Secretary . . .") Although 15 U.S.C. § 18 was argued as a defense to the acquisition in *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960), the Court did not apply it since there was no "statutory provision" which empowered the Secretary of Agriculture to approve this transaction. See *id.* at 469-70.

<sup>14</sup> See notes 50-87, 109-67, 201-301 *infra* and accompanying text. Despite the large volume of litigation, the exemptions' scope remains unclear particularly regarding monopolization claims and attempt to monopolize claims. See Note, *Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense*, 44 VA. L. REV. 63, 82-84 (1958); Recent Developments, *supra* note 1, at 397. Most case law involving cooperatives is recent. In the past, Congress prohibited the Department of Justice from spending money to prosecute farmer associations. Between 1914 and 1922,

cooperatives to grow quite large<sup>15</sup> and to expand into nonagricultural sectors of the economy.<sup>16</sup> Currently there are local, regional and national associations for almost every agricultural activity,<sup>17</sup> and for some nonagricultural activities such as insurance and utility services.<sup>18</sup>

This Note discusses the antitrust implications of agricultural marketing cooperatives.<sup>19</sup> This Note will examine the statutory structure of the Capper-Volstead Act and section 6 of the Clayton Act. Additionally, the 1960 United States Supreme Court decision in *Maryland & Virginia Milk Producers Association v. United States*<sup>20</sup> will be discussed as well as congressional reaction

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only one case construed § 6 of the Clayton Act. See Recent Developments, *supra* note 1, at 401 & n.30. Likewise, there were no controversies which required interpretation of the Capper-Volstead Act during its first 16 years. Saunders, *supra* note 8, at 44-45. An important cause of increased antitrust litigation is the increase in size and effect of agricultural cooperatives. Noakes, *supra* note 6, at 9.

<sup>15</sup> Noakes, *supra* note 6, at 8-9. However, according to one commentator, one of the keys to future development of farmers' economic power is "the amount of latitude permitted in organizing bargaining units." *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 511. See also *The Capper-Volstead Act*, *supra* note 9, at 446 (when compared to processors and packers, agricultural cooperatives are not as large, pervasive or powerful as they need to be and, therefore, most producer cooperatives merely take the best price rather than bargain for it).

In 1975, five out of six farmers were members of at least one farmer association. Note, *supra* note 4, at 341. These associations are most prominent in the dairy, grain, livestock, fruit, vegetable, cotton and poultry sectors of the American economy. See J. VOORHIS, *supra* note 2, at 89. In 1979 such cooperatives had an annual sales volume reaching \$25.8 billion—29% of all farm receipts. R. HEFLEBOWER, COOPERATIVES AND MUTUALS IN THE MARKET SYSTEM 32 (1980).

<sup>16</sup> See Note, *supra* note 4, at 343 (listing the various nonagricultural sectors now occupied by these associations). See also HEFLEBOWER, *supra* note 15, at 4, (table 1.1) (providing a list of sectors where cooperatives are prominent). Marketing cooperatives have begun to handle all aspects of marketing and processing between the producer and consumer. Noakes, *supra* note 6, at 9.

<sup>17</sup> Mischler, *supra* note 2, at 383.

<sup>18</sup> *Id.*

<sup>19</sup> Marketing cooperatives can be divided into two distinct types, those that process commodities and those that bargain for their sale. The first of these, the handling cooperative, receives raw products from its members and increase the product's value by washing, boxing, drying or other processing. *The Capper-Volstead Act*, *supra* note 9, at 447. This cooperative's major problem is acquiring capital and market strength. See generally *id.* at 447-49 (describing these problems and how antitrust laws hinder solutions). The second, bargaining cooperatives, represent the seller at negotiations with purchasers. The primary difficulties for bargaining cooperatives are attracting member-producers and buyer recognition. See generally *id.* at 449-51 (including proposed congressional solutions for these problems).

<sup>20</sup> 362 U.S. 458 (1960).

to that decision. Despite restrictive language in *Milk Producers Association*,<sup>21</sup> courts have apparently followed the philosophy embodied in the congressional reaction.<sup>22</sup> Economists have criticized courts for ignoring the cooperatives' enormous economic power,<sup>23</sup> and in response, some courts apparently have shifted toward requiring stricter behavioral standards before allowing antitrust immunity to attach.<sup>24</sup> This Note concludes with a plea for Congress to reexamine the policy rationales behind the cooperative antitrust immunity, as the judicial branch needs congressional guidance for deciding the scope of cooperative antitrust immunities.

### I. EXPRESS REQUIREMENTS FOR RECEIVING COOPERATIVE ANTITRUST IMMUNITY

Two aspects of the Capper-Volstead Act<sup>25</sup> have been litigated: the requirements for becoming an eligible Capper-Volstead cooperative and the scope of the immunity granted by the Act.<sup>26</sup> The Capper-Volstead Act has several express requirements to be met before an agricultural cooperative receives immunity:<sup>27</sup> the cooperative's members must produce agricultural products;<sup>28</sup>

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<sup>21</sup> See notes 54-79 *infra* and accompanying text.

<sup>22</sup> See notes 88-105 & 202-268 *infra* and accompanying text.

<sup>23</sup> See notes 189-99 *infra* and accompanying text.

<sup>24</sup> See notes 269-98 *infra* and accompanying text.

<sup>25</sup> 7 U.S.C. §§ 291-92 (1982) (original version at ch. 57, §§ 1-2, 42 Stat. 388 (1922)).

<sup>26</sup> The scope of the Capper-Volstead immunity is discussed at notes 50-87, 109-67 & 201-301 *infra* and accompanying text.

<sup>27</sup> See 7 U.S.C. § 291 (1982).

The question of what happens when a cooperative technically violates one of [the organizational tests] cannot be answered today.

In deciding the latest Sunkist case, the Supreme Court indicated that it would consider whether the violations resulted in an increase in the market influence of the cooperative. Such is not a very precise test, at best. Nevertheless, such a broadly-framed requirement seems reasonable and appropriate.

*The Capper-Volstead Act*, *supra* note 9, at 445.

<sup>28</sup> 7 U.S.C. § 291 (1982). Generally, to meet this criteria, only producers may own the cooperative's capital stock. Likewise, a non-stock cooperative may have only producer-members. An exception to the general rule is the association whose members are all Capper-Volstead cooperatives. These federated cooperatives are also entitled to the Capper-Volstead Act's immunity. In *Case-Swayne Co. v. Sunkist Growers*, the Supreme Court, holding that a cooperative could not receive Capper-Volstead immunity, relied on the fact that 15% of its members were not producers but were private corporations,



the cooperative must operate for its members' mutual benefit;<sup>29</sup> the cooperative's nonmember business cannot be greater than its member business;<sup>30</sup> the cooperative must be structured either so that each member has only one vote regardless of the amount of membership capital owned<sup>31</sup> or such that the cooperative may not pay dividends exceeding eight percent per year on stock or membership capital;<sup>32</sup> cooperative membership must be voluntary;<sup>33</sup> and the cooperative must perform one of the statute's enumerated acts before receiving the immunity.<sup>34</sup> Most of these requirements are inherent in an agricultural cooperative's basic structure and, therefore, should present little problem for the eligible cooperative.<sup>35</sup>

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partnerships, and individuals who handled the grower's fruit and marketed it through Sunkist. See 389 U.S. 384, 386-88 (1967).

The Capper-Volstead Act protects nut or fruit growers, farmers, planters, ranchmen, and dairymen. The fact that the statute does not list every type of producer does not mean Congress intended to omit them. See *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 507. People who accept the risks and duties of an owner of growing crops or livestock are producers; whereas, salaried farm managers and cash-rent lessors are not producers. See *id.* at 509. A handler may not change his status (e.g., from handler to producer) to avoid compliance with an order issued under the Agricultural Marketing Agreement Act. It appears that the cooperative must be a bona fide cooperative, not a result of a sham transaction. Courts, therefore, will look at substance not form. See Note, *supra* note 9, at 533 (quoting *United States v. Elm Spring Farm*, 38 F. Supp. 508, 511 (D. Mass. 1941)).

<sup>29</sup> 7 U.S.C. § 291 (1982). This element requires "distributions on a patronage basis." *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 510. Inherent in this element is the concept of absolute farmer control in order for the association's activities to serve the producer's interest. This element parallels the "legitimate objects" standard in § 6 of the Clayton Act. See *id.*

<sup>30</sup> 7 U.S.C. § 291 (1982). Nonmember business has been defined as "[a]ll commodities not actually produced by members, but which are marketed by an association." *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 510. This requires precise bookkeeping. This requirement is difficult for a bargaining cooperative since it must prove the amount of products "handled" for members and nonmembers. *Id.*

<sup>31</sup> See 7 U.S.C. § 291 (1982). Regardless of whether this requirement is met, only producers may vote. See *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 510.

<sup>32</sup> See 7 U.S.C. § 291 (1982). This may be the better organizational format when large and small farms are cooperative members. See *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 510. This requirement limits only the return to capital. Although that rate of return may have enabled cooperatives to attract capital during the 1920s, it is questionable whether the rate is sufficient today. *But see id.* at 510-11.

<sup>33</sup> See 7 U.S.C. § 291 (1982). See also Mahaffie, *supra* note 9, at 437.

<sup>34</sup> See Mahaffie, *supra* note 9, at 437. A farm supply cooperative does not qualify for the Capper-Volstead immunity; however, § 6 of the Clayton Act may provide that benefit if the cooperative is organized without capital stock. See *id.*; *The Capper-Volstead Act*, *supra* note 9, at 446.

<sup>35</sup> Compare note 3 *supra* with notes 28-32 *supra* and accompanying text.

Since the Capper-Volstead Act does not require the cooperative to have a corporate form or capital stock,<sup>36</sup> a bargaining group may structure itself as an unincorporated association, a stock or nonstock farmer cooperative, a nonprofit corporation or a regular business corporation.<sup>37</sup> If more than one cooperative forms a federation which then becomes a centralized marketing agency, this structure should not automatically preclude Capper-Volstead immunity.<sup>38</sup> Section 6 of the Clayton Act has the added requirement that the cooperative must operate on a nonprofit basis.<sup>39</sup>

Additional analysis of the technical requirements of a Capper-Volstead cooperative is beyond the scope of this Note. The more interesting issues concern the scope of the immunity granted by the Clayton Act and the Capper-Volstead Act.

## II. THE SCOPE OF THE ANTITRUST IMMUNITY

### A. Early Decisions

On its face, the Capper-Volstead Act appears specific; nevertheless, the parameters of this antitrust immunity are unclear.<sup>40</sup>

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<sup>36</sup> See 7 U.S.C. § 291 (1982).

<sup>37</sup> *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 511.

<sup>38</sup> *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.*, 370 U.S. 19, 29 (1962). See also *Mischler*, *supra* note 2, at 394 & n.36. It is possible, however, for federated cooperatives to lose this exemption. See Comment, *supra* note 7, at 95 (suggesting that the *Sunkist Growers, Inc.* opinion requires that the other cooperatives be in the same or similar lines of production and that the cooperative's mode of operation may be more important, e.g., the use of separate corporations could, under certain circumstances, be seen as the economic equivalent of three independent organizations).

<sup>39</sup> This requirement was intended to encourage patronage distribution rather than high returns to capital or an equal share distribution. It does not, however, preclude a profit motive by the cooperative. *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 510. For a cooperative to receive Clayton immunity, "the organization must be an agricultural or horticultural organization, instituted for the purpose of mutual help, and not having capital stock or be conducted for profit." Hufstедler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 ADMIN. L. REV. 455, 456 (1969-70).

<sup>40</sup> One difficulty with interpreting the cooperative exemptions is that Congress "did not [use] . . . the indisputable exempting language . . . in other statutes conferring antitrust immunity." Saunders, *supra* note 8, at 37. A misleading Attorney General opinion further confused matters: "[The object of the Capper-Volstead Act] was primarily to insure cooperative associations that qualified thereunder immunity from prosecution under the Federal antitrust laws." 36 Op. Att'y Gen. 326, 333 (1930). Since this statement, however, the Department of Justice has emphasized that the Act "confers

The Act authorizes farmers collectively to process, prepare for market, handle and market their products in interstate and foreign commerce.<sup>41</sup> The cooperative may also have common marketing agents.<sup>42</sup> The Act also allows cooperatives and their members to make the necessary agreements to achieve these purposes.<sup>43</sup> The agricultural cooperative exemption allows "producers of food products to join together in cooperative associations for the marketing of their products [and] . . . to act collectively in the sale of their products."<sup>44</sup> Whereas, section 6 of the Clayton Act establishes a more general immunity.<sup>45</sup>

Section 2 of the Capper-Volstead Act also authorizes the Secretary of Agriculture to issue cease and desist orders if there is reason to believe that collective activity is unduly enhancing the product's price.<sup>46</sup> The court in *United States v. Borden Co.*<sup>47</sup> stated that section 2 of the Capper-Volstead Act is a complement

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no blanket immunity upon cooperatives." Saunders, *supra* note 8, at 45.

Because of the Act's vagueness, several courts misconstrued the limits of its immunity. One such court stated:

It may be that the acts of the defendant cooperative in this case, tested without regard to the provisions of the Clayton Act, are monopolistic in character. I have not given serious thought to that question, for it seems to me when Congress said cooperatives were not to be punished, even though they became monopolistic, it would be as ill-considered for me to hold to the contrary as were some of the early labor decisions . . . .

*United States v. Dairy Co-op Ass'n*, 49 F. Supp. 475, 475 (D. Or. 1943). According to one commentator, this opinion "is not the law and likely was not the law when it was written." *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 513. See also Saunders, *supra* note 8, at 43 n.36. In a more recent example of judicial misconstruction, one court opined: "[A]n agricultural cooperative is entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities." *United States v. Maryland & Virginia Milk Producers Ass'n, Inc.*, 167 F. Supp. 45, 52 (D.D.C. 1958). This portion of the opinion was later reversed by the United States Supreme Court in *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 468 (1960).

<sup>41</sup> 7 U.S.C. § 291 (1982).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Noakes, *supra* note 6, at 7.

<sup>45</sup> See 15 U.S.C. § 17 (1982).

<sup>46</sup> See 7 U.S.C. § 292 (1982). Regulations have been promulgated pursuant to this statute which govern the procedural aspects of the Secretary's order. See 7 C.F.R. §§ 1.160-.175 (1985).

<sup>47</sup> 308 U.S. 188 (1939). The government brought criminal charges for violating § 1 of the Sherman Act. *Id.* at 191.

to, not a substitute for, Sherman Act enforcement,<sup>48</sup> rendering section 2 almost useless. In fact, the Secretary of Agriculture has never relied on it.<sup>49</sup>

Cooperatives have attempted to extend the scope of their antitrust immunities. *Borden Co.* involved the combination of a bargaining cooperative with city officials and other non-cooperative groups to fix the price of milk. Reading the Act restrictively,<sup>50</sup> the Supreme Court said the language of section 6 of the Clayton Act specifically allows noncapital stock cooperatives to achieve legitimate objectives.<sup>51</sup> However, according to the Court, a cooperative's Capper-Volstead powers do not "authorize any combination or conspiracy with *other persons* in restraint of

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<sup>48</sup> See *id.* at 206. The cooperative argued that the Secretary of Agriculture must take action under § 2 before criminal prosecution could occur. The Court rejected this argument and said:

But as § 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which § 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies.

*Id.* The Court stated several reasons to support this holding. First, the Capper-Volstead Act is not so extensive as the Sherman Act, since Capper-Volstead only provides for administrative relief while the Sherman Act provides for criminal sanctions. The Sherman Act also prohibits attempts to monopolize. Second, § 2 does not provide relief without an administrative proceeding. Third, the § 2 procedure applies only where the effect of the § 1 immunity was to enhance prices unduly. See *id.* See also *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. at 463 (reaffirming the *Borden Co.* decision upon this issue).

<sup>49</sup> Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 COLUM. L. REV. 1623, 1634 (1980); Mahaffie, *supra* note 9, at 437. But cf. *The Capper-Volstead Act*, *supra* note 9, at 446 (This mechanism has not been used because there has been no need for its use).

<sup>50</sup> "That Court's decision, *United States v. Borden Co.*, scotched completely the claim that Capper-Volstead conferred absolute antitrust immunity." Saunders, *supra* note 8, at 45. See also Noakes, *supra* note 6, at 9-10.

<sup>51</sup> See 308 U.S. at 204. "[T]he antitrust laws should not be construed to forbid members of such organizations 'from lawfully carrying out the legitimate objects thereof.' " *Id.* (quoting 15 U.S.C. § 17 (1982)). See also Comment, *supra* note 7, at 76-77 & n.14 (legislative history reveals little agreement in Congress about the scope of the "legitimate objects" language).

The first case to interpret § 6 of the Clayton Act was *United States v. King*, 250 F. 908 (D. Mass. 1916). In *King* the court said: "[Section six means] that organizations such as it describes are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations." *Id.* at 910. *Accord* *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921) (similarly interpreting § 6 in the context of labor unions).

trade [and consequently in violation of the Sherman Act] that these producers may see fit to devise."<sup>52</sup> Thus, the general rule from *Borden Co.* is that a conspiracy to restrain trade between a cooperative and non-cooperative entity is not exempt from antitrust liability by the Capper-Volstead Act.<sup>53</sup>

The Supreme Court continued this restrictive analysis in *Milk Producers Association*.<sup>54</sup> Although the cooperative was an eligible Capper-Volstead cooperative,<sup>55</sup> the Court held that Congress did not intend to provide Sherman Act section 2 immunity to cooperatives who engage "in competition-stifling practices."<sup>56</sup>

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<sup>52</sup> 308 U.S. at 204-05 (emphasis added). This statement is known as the "other person" rule. Comment, *supra* note 7, at 85. Since the *Borden Co.* decision, cooperatives may still be able to avoid price fixing charges.

When associations are engaged in price-making activities, it is advisable for them to meet with prospective purchasers one at a time, refraining from attempting to negotiate through trade associations, and to form purchase agreements which go no further than is necessary to market the products which the association has to offer.

*Antitrust and Agricultural Cooperatives*, *supra* note 9, at 513-14.

<sup>53</sup> See, e.g., *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 513 (cooperatives are not exempt from antitrust laws). The Court extended this principle to prohibit a combination with cooperatives having non-"farmer" members, as that term "farmer" was understood in 1922. See *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827-29 (1978). The *Borden Co.* principle is similar to that which courts apply to the labor union exemption when the union is involved with a group not concerned with employer-employee relationships. See *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 809-10 (1945); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145 (1942).

It is arguable that the "other person" rule is not a separate and independent rule but merely a part of the *Milk Producers Ass'n* prohibition against predatory practices. See Saunders, *supra* note 8, at 48 (arguing that cooperatives are subject to more than the "other person" rule, this commentator phrased the *Borden Co.* issue as: "[T]he issue was not loss, by reason of agreement with outsiders, of an immunity given by Capper-Volstead, but whether the conduct charged came within the immunity."). But see Comment, *supra* note 7, at 91 ("In *Maryland and Virginia* the Court extended *Borden Co.* to include 'legitimate objects' as well as 'other persons.'").

<sup>54</sup> 362 U.S. 458. The cooperative was comprised of about 2,000 dairy farmers and supplied as much as 86% of the milk purchased by Washington, D.C. area milk dealers. *Id.* at 460. For a brief discussion of the legal struggles between the government and this cooperative, see Recent Developments, *supra* note 1, at 402 n.41.

<sup>55</sup> See 362 U.S. at 461. This Court also rejected the argument that the Secretary of Agriculture had primary jurisdiction under § 2 of the Capper-Volstead Act. See *id.* at 462-63.

<sup>56</sup> *Id.* at 463. The Court said the exemption gave cooperatives the rights and responsibilities of a corporation. "[T]he general philosophy of [the Clayton and Capper-Volstead Acts] was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsi-

Thus, according to the Court, agricultural cooperatives may not engage in "predatory" trade practices.<sup>57</sup> Thus, the key question in later cases is whether the cooperative's acts were predatory. Unfortunately, courts too often label activity by cooperatives as "predatory" without further analysis of the concept.<sup>58</sup>

The Supreme Court developed this "predatory action" test by analyzing the legislative history of section 6 of the Clayton Act and the Capper-Volstead Act.<sup>59</sup> Congress enacted section 6 to bar federal prosecution of agricultural cooperatives engaged in interstate commerce<sup>60</sup> and for the purpose of allowing farmers to form cooperatives without violating the antitrust laws.<sup>61</sup> Cooperatives may only fulfill their legitimate objectives without engaging in predatory trade practices.<sup>62</sup> Under section 1 of the

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bility—available to businessmen acting through corporations as entities." *Id.* at 466.

A Massachusetts district court issued an opinion shortly after the district court opinion in *Milk Producers Ass'n*. Criticizing the lower court opinion, the Massachusetts court could "think of no purpose to be served by permitting cooperatives to use unfair methods to put competitors out of business." *April v. National Cranberry Ass'n*, 168 F. Supp. 919, 923 (D. Mass. 1958).

<sup>57</sup> 362 U.S. at 463, 465-66, 467 (Court using this language is analyzing both statutory immunities). See also LEGAL PHASES, *supra* note 6, at 277 ([T]he courts are primarily concerned with how the defendant employs its power and strength, and the legality of a large industrial unit depends not on its size but upon the character of the business methods employed."). The court in *April v. National Cranberry Ass'n* first condemned a cooperative's "predatory" practices saying that Capper-Volstead did not make lawful "purely predatory practices seeking to monopolize [in ways] forbidden to an individual corporation." 168 F. Supp. at 923. For the definition of "predatory practices," see notes 109-113 *infra* and accompanying text.

<sup>58</sup> Compare *Holly Sugar Corp. v. Goshen County Coop. Bee Growers Ass'n*, 725 F.2d 564, 569 (10th Cir. 1984) ("[T]he association may not engage in predatory tactics such as picketing and harassment, coerced membership and discriminatory pricing.") with *Kinnett Dairies v. Dairymen, Inc.*, 512 F. Supp. 608, 631 n.31 (M.D. Ga. 1981) (detailed analysis of the meaning of "predatory"), *aff'd*, 715 F.2d 520 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 1327 (1984).

<sup>59</sup> See 362 U.S. at 464-67.

<sup>60</sup> *Id.* at 464. Congress passed the Act due to its concern that "the mere organization of farmers for mutual help was often considered to be a violation of the antitrust laws." *Id.* The existing legislative history, being more concerned with labor union development, reveals congressional uncertainty concerning the scope of § 6 as it relates to agricultural cooperatives but apparently there was no intention totally to exempt cooperatives from the antitrust laws. See Recent Developments, *supra* note 1, at 399-400 nn.20-22.

<sup>61</sup> See 362 U.S. at 465. Congressional committee reports support this interpretation. *Id.* at 465 & n.13.

<sup>62</sup> *Id.* at 465-66. See also *Duplex Printing Press Co. v. Deering*, 254 U.S. at 469 (holding that § 6 provides no immunity for a labor union which departs from its legitimate objectives).

Capper-Volstead Act, two enumerated statutory powers are the legitimate objects of an agricultural cooperative.<sup>63</sup> These statutory powers provide for the "[collective] processing, preparing for market, handling, and marketing" [of] products through common marketing agencies and the making of "necessary contracts and agreements to effect such purposes."<sup>64</sup> Both the language and the legislative history indicate that the statute only authorizes the existence of a cooperative business, not an exemption to the antitrust laws.<sup>65</sup>

In determining the nature of prohibited predatory conduct, it is best to start with the Supreme Court's analysis in *Milk Producers Association*. The Court determined the trial court should not have dismissed the monopolization charge since the cooperative's acts were not "legitimate objects" of a cooperative.<sup>66</sup> While the Court did not apply the Capper-Volstead Act to decide the issue of section 7 of the Clayton Act,<sup>67</sup> the defendant does not appear to have argued for its application.<sup>68</sup> The

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<sup>63</sup> See 7 U.S.C. § 292 (1982).

<sup>64</sup> 362 U.S. at 466 (quoting 7 U.S.C. § 292 (1982)). But see *Case-Swayne Co. v. Sunkist Growers*, 389 U.S. 384, 391 (1967) (language to the effect that Congress passed the Capper-Volstead Act to clarify and extend a cooperative's exemptions). If this latter language is correct, the Court succeeded in merely confusing this issue. See *The Capper-Volstead Act*, *supra* note 9, at 443.

<sup>65</sup> 362 U.S. at 466-67 (providing a brief review of the legislative history). The Court recognized that the legislative history was conflicting. See *id.* at 467. See also *The Capper-Volstead Act*, *supra* note 9, at 443 ("As is true of any legislative history, you can find in the Congressional discussions of the Capper-Volstead Act some material which supports and material which refutes nearly any point you wish to make."); Note, *supra* note 9, at 529 (cooperative's status under the antitrust laws is unclear due to the conflicting history).

<sup>66</sup> The complaint charged that the association had monopolized and attempted to monopolize the fluid milk trade in Virginia, Maryland and the District of Columbia. 362 U.S. at 460. The cooperative's questionable practices included attempts to interfere with shipments of nonmembers' milk, an attempt to induce a Washington dairy to shift its non-Association producers to the Baltimore market, the boycott of a feed and farm supply store in order to compel the owner (who also owned a dairy) to buy cooperative milk, and the compelling of another dairy to purchase cooperative milk by the use of financial leverage. *Id.* at 468. These activities, if proven, would constitute violation of § 2 of the Sherman Act and would be beyond the "legitimate objects" of a cooperative and the protection of the Capper-Volstead Act. *Id.*

<sup>67</sup> See *id.* at 468-70. The complaint charged that the association had combined and conspired with Embassy Dairy and others to eliminate and foreclose competition. *Id.* at 468-69.

<sup>68</sup> See *id.* at 468-70. The trial judge held that the Capper-Volstead Act did not exempt cooperatives from the sanctions of § 7 of the Clayton Act. *United States v. Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 45, 53 (D.D.C. 1958), *rev'd on other grounds*, 362 U.S. 458 (1960). The trial court did not apply Capper-Volstead since this charge involved activities with people who were not cooperative members. 362 U.S. at 462.

cooperative did argue that because the Capper-Volstead Act permitted the cooperative to make "the necessary contracts and agreements" to process, handle and market milk for their members,<sup>69</sup> the Act protected it from section 3 of the Sherman Act.<sup>70</sup> In rejecting this argument, the Court concluded, based on the evidence and findings, that the parties entered the purchase contract because of its usefulness in restraining competitors and competition in the area.<sup>71</sup> The Court then held "that the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors."<sup>72</sup>

The Court's holding in *Milk Producers Association* established two criteria that an agricultural cooperative must meet in order to receive the Capper-Volstead immunity. First, the cooperative must try to achieve a legitimate objective of being a

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<sup>69</sup> 362 U.S. at 471. The cooperative argued that the competitor's assets were useful for processing and marketing milk. The Court assumed that a purchase for business use could be lawful under the Capper-Volstead Act. *See id.* at 472.

<sup>70</sup> *Id.* at 471-72. The trial court found that the motives for and results of the cooperative's acquisition of its competitors were to "eliminate the largest purchaser of non-Association milk in the area; force former Embassy non-Association producers either to join the Association or to ship to Baltimore . . . ; eliminate the Association's prime competitor from government contract milk bidding; and increase the Association's control of the Washington market." *Id.* at 469. *See also* United States v. Maryland and Virginia Milk Producers Ass'n, 167 F. Supp. at 807-08. The facts that supported the § 3 charge were:

1. The cooperative paid almost double the asset's book value.
2. Embassy was the largest area milk dealer competing with the Association's dealers.
3. Embassy's owner agreed not to compete in the Washington area for ten years.
4. Embassy's owner agreed to try to persuade his independent producers to join the Association or to sell to distributors who purchased from the Association.

362 U.S. at 470. *See Note, Agricultural Cooperatives and the Antitrust Laws: A New Departure*, 36 IND. L.J. 497, 499-500 (1960-61). The trial court also found that the acquisition caused a foreclosure of competition and the cooperative intended to restrain trade. This was an unreasonable restraint of trade which violated the Sherman Act. *See* 362 U.S. at 471.

<sup>71</sup> *See* 362 U.S. at 472. The mere acquisition was not the predatory act. It was the manner of acquisition as well as the other cooperative activities which were the predatory practices. *See Antitrust and Agricultural Cooperatives, supra* note 9, at 519.

<sup>72</sup> 362 U.S. at 472.



cooperative engaged in an agricultural business activity.<sup>73</sup> Second, the cooperative must not use predatory trade practices in achieving its goal.<sup>74</sup> This ends-means analysis creates four types of fact patterns which emerge in agricultural cooperative anti-trust allegations.<sup>75</sup>

The *Milk Producers Association* decision involved two of three fact patterns. The violation of section 2 of the Sherman Act fell within the predatory act-legitimate goal category. Despite the Court's language that the cooperative tried to achieve an illegitimate goal,<sup>76</sup> the Court did not hold that expansion in the market was an illegitimate goal.<sup>77</sup> It was the anticompetitive activities, the predatory conduct, which the Court felt was beyond the scope of the Capper-Volstead immunity.<sup>78</sup> The section 2 violation occurred because of the method the Association used, not the alleged monopolization.<sup>79</sup>

The Sherman Act section 3 charge is more complex. This fact pattern may be interpreted as either a predatory act-legitimate goal situation or a predatory act-illegitimate goal fact pattern.<sup>80</sup> The Court expressly did not decide whether the goal was legitimate or illegitimate but assumed that the purchase of the competitor for business use could be lawful under the Capper-Volstead Act.<sup>81</sup> This acquisition, however, was not for a legitimate business purpose.<sup>82</sup> The intent of both the Association and its competitor was to suppress competitors and competition.<sup>83</sup> Thus, a combination of predatory acts and the intent to

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<sup>73</sup> *Id.* at 471.

<sup>74</sup> *Id.* at 472.

<sup>75</sup> The four different fact patterns are: 1. predatory conduct—illegitimate end; 2. predatory conduct—legitimate end; 3. nonpredatory conduct—illegitimate end; 4. nonpredatory conduct—legitimate end. See *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1182-83 (8th Cir. 1982); *United States v. Dairymen, Inc.*, 660 F.2d 192, 195 (6th Cir. 1981), *cert. denied*, 461 U.S. 938 (1983). But see Comment, *supra* note 7, at 99 (indicating only two possible fact patterns).

<sup>76</sup> See 362 U.S. at 468.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.* at 470-71.

<sup>81</sup> See *id.* at 471-72.

<sup>82</sup> See *id.* at 472.

<sup>83</sup> See *id.* One commentator described this aspect of the case stating: "Under [the legitimate objects] test the Court minutely examines the intentions as well as the methods of the cooperative." Comment, *supra* note 7, at 92.

suppress competition was sufficient to remove the immunity from the cooperative.<sup>84</sup>

Left unresolved by *Milk Producers Association* was whether expansion is always a legitimate objective for a cooperative. It may be assumed that self-generated, natural expansion (i.e., an increase in membership) is a legitimate objective since the goal of the statutory immunities was to foster this type of growth.<sup>85</sup> Later courts assumed that expansion by acquisition was a legitimate goal of a cooperative,<sup>86</sup> even though the Supreme Court did not expressly decide that issue.<sup>87</sup> This uncertainty forced Congress to consider amending the Capper-Volstead Act in 1961.

### B. Congressional Reaction

Following the *Milk Producers Association* decision, the Senate began considering amendments to the Capper-Volstead Act.<sup>88</sup> There were two major amendments proposed.<sup>89</sup> One amendment,

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<sup>84</sup> See 362 U.S. at 472.

<sup>85</sup> See notes 9 & 11 *supra* and accompanying text.

<sup>86</sup> See, e.g., *Fairdale Farms v. Yankee Milk*, 635 F.2d 1037, 1043-44 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981).

<sup>87</sup> See notes 76-81 *supra* and accompanying text.

<sup>88</sup> See S. 1643, 87th Cong., 1st Sess. § 401(b)-(c) (1961). See also 107 CONG. REC. 4097-98, 6032 (1961) (President Kennedy supported these amendments in order to encourage farmer cooperatives). But see 107 CONG. REC. 6032, 13,357-58 (1961) (Attorney General opposed to § 401(c) which would allow mergers and acquisitions).

There are indications from the Senate debates that agricultural cooperatives proposed the amendments. See 107 CONG. REC. 13,347-48 (1961) (statement of Sen. Holland). Cf. 107 CONG. REC. 13,348 (1961) (statement of Sen. Holland) (no public Senate hearings on this issue). The debates also indicate that opposition to the amendment was initiated by the "world's largest grain dealer." 107 CONG. REC. 13,361 (1961) (statement of Sen. Aiken).

<sup>89</sup> S. 1643, 87th Cong., 1st Sess. § 401(b) stated: "(b) Two or more cooperative associations, as defined in the Agricultural Marketing Act of 1929, as amended, may act jointly in a federation of such cooperative associations, or through agencies in common, in performing those acts which farmers acting together in one such association may lawfully perform." 107 CONG. REC. 13,348 (1961). An amendment to strike § 401(b) from the Agricultural Act of 1961 failed. 107 CONG. REC. 13,364 (1961). An amendment to modify this section also failed. See 107 CONG. REC. 13,557-58 (1961). S. 1643, 87th Cong., 1st Sess. § 401(c) stated:

Any such association or federation of such associations may, in addition to the rights otherwise conferred by law, acquire directly or indirectly the whole or any part of the assets, stock or other share capital of any other such association or any corporation engaged in the same or a related kind of commerce.

Subject to the terms, limitations, and procedures set forth in section 2

the cooperative joint action amendment, would have given the cooperatives preferred status over other businesses, whereas the original Capper-Volstead Act gave that status only to farmers.<sup>90</sup> The other proposed amendment would have allowed the Secretary of Agriculture to approve mergers and acquisitions by agricultural cooperatives.<sup>91</sup> This amendment was designed to circumvent the Supreme Court's holding in *Milk Producers Association*.<sup>92</sup> The amendment would have reversed the *Milk Pro-*

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hereof and in addition thereto, the Secretary may require divestiture of the assets, stock or other share capital, held in violation of this act, if any there be, in such manner and within such time as he may prescribe.

107 CONG. REC. 13,563 (1961). The motion to strike § 401(c) passed. See 107 CONG. REC. 13,564 (1961). Defeated supporters of § 401(c) offered for consideration a version which authorized the Secretary of Agriculture to enforce the antitrust laws against cooperatives. See 107 CONG. REC. 13,569 (1961). An amended version of this amendment was defeated. See 107 CONG. REC. 13,584 (1961).

Amendment supporters distinguished the two sections. Generally, § 401(b) allowed joint action by two or more cooperatives so they could do anything a single cooperative could legally do. Section 401(c) allowed unification of a cooperative and another business entity, either cooperative or corporate. See 107 CONG. REC. 13,349 (1961) (statement of Sen. Holland).

<sup>90</sup> See S. 1643, 87th Cong., 1st Sess. § 401(b). Another purpose of § 401(b) was to clarify language which appeared in *Sunkist Growers v. Winckler & Smith Citrus Prods. Co.*, 284 F.2d 1, 22 (9th Cir. 1960). That language cast doubt upon the ability of a federated cooperative to do the same acts as a single cooperative. See S. REP. NO. 566, 87th Cong., 1st Sess. 78, reprinted in 1961 U.S. CODE CONG. & AD. NEWS 2243, 2320; 107 CONG. REC. 13,349-50 (1961) (statement of Sen. Holland).

<sup>91</sup> See S. 1643, 87th Cong., 1st Sess. § 401(c). See also 107 CONG. REC. 13,281 (letter from Rep. Celler to Rep. Cooley). "Subsection (c) authorizes farmer cooperatives to acquire, directly or indirectly, the assets, stock or other share capital of, or to merge with any other cooperative or any corporation which is engaged in the same or related kind of commerce." 107 CONG. REC. 13,339 (1961) (statement of Sen. Kefauver). These mergers would have been governed by § 2 of the Capper-Volstead Act and not by § 7 of the Clayton Act's prohibition against a merger which tended to create a monopoly or substantially limit competition. *Id.*

<sup>92</sup> According to supporters, § 401(c) was also to reestablish the original intent of the Capper-Volstead Act by allowing mergers and acquisitions by cooperatives. The legality of these combinations was supposedly in doubt following the *Milk Producers Ass'n* decision. See 107 CONG. REC. 13,559 (1961) (statement of Sen. Ellender). The proposal's critics argued that one case did not create a threat to cooperatives. See 107 CONG. REC. 13,282 (letter from Rep. Celler to Rep. Cooley).

Better arguments, however, attacked the supporters' analogy of agricultural cooperatives to other regulated industries which would have justified the Secretary of Agriculture's regulation of mergers and acquisitions. First, agriculture is a competitive industry and not regulated by the government. Second, all firms in a regulated industry are regulated, whereas, the amendment would only regulate cooperatives. See *id.*; 107 CONG. REC. 13,564 (1961) (statement of Sen. Pastore).

Proponents further justified the immunity on the basis of comparative economic

*ducers Association* decision by placing exclusive regulatory jurisdiction in the Secretary of Agriculture.<sup>93</sup> It is important to note that the Secretary would not have had jurisdiction in the *Milk Producers Association* case since that acquisition did not enhance prices.<sup>94</sup> These proposed amendments drew criticism as being too broad, unjustified,<sup>95</sup> and against public interest<sup>96</sup> par-

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strength between cooperatives and corporations. The proponents argued that since the Department of Justice permitted large corporations to merge, cooperatives should be allowed to merge. *See, e.g.*, 107 CONG. REC. 13,560 (1961) (statement of Sen. Long); 107 CONG. REC. 13,561 (1961) (statement of Sen. Aiken); 107 CONG. REC. 13,562 (1961) (statement of Sen. Proxmire). This analysis avoids the issue of whether two wrongs make a right. Long's argument merely justifies stricter enforcement of antitrust laws against corporations. *See* 107 CONG. REC. 13,562 (statement of Sen. Kefauver) (encouraging prosecution of large corporations).

<sup>93</sup> *See* S. 1643, 87th Cong., 1st Sess. § 401(c) (1961). The opponent's main argument against § 401(c) was that it would reverse the *Milk Producers Ass'n* decision. *See* 107 CONG. REC. 13,339 (1961) (statement of Sen. Kefauver). The amendment's proponents said that the change would allow monopolization but not the evils from monopolization (unduly high prices) since the Secretary of Agriculture would retain the power to modify price under § 2 of the Capper-Volstead Act. *See* 107 CONG. REC. 13,350 (1961) (statement of Sen. Long).

<sup>94</sup> So, too, it is no answer to say that milk prices in the area did not climb to a higher level subsequently to the transaction. Prices are affected and influenced by numerous imponderable factors. It is within the realm of possibility that prices might have fallen were it not for the acquisition of Embassy by the Association.

*United States v. Maryland & Virginia Milk Prod. Ass'n*, 167 F. Supp. at 807.

<sup>95</sup> "Section 401(b), while short and deceptively simple, actually would grant sweeping and unjustified antitrust exemptions for two or more agricultural cooperatives to conspire to fix prices, divide territories, boycott third persons, and otherwise restrain trade." 107 CONG. REC. 13,281 (1961) (letter from Rep. Celler to Rep. Cooley). *See also* 107 CONG. REC. 13,339 (1961) (statement of Sen. Kefauver) (examples of restricting output, dividing territories and customers, blacklisting and other related activities).

The other proposed amendment (§ 401(c)) was criticized because: 1) it gave the Secretary of Agriculture no criteria by which to measure the antitrust effect of his decision; 2) the Secretary of Agriculture is not part of the judiciary; 3) the Secretary of Agriculture could intervene only where monopoly abuses resulted in unduly enhanced prices; 4) it would be difficult to unscramble a merger after the time passed when unduly enhanced prices would appear; 5) a question existed concerning whether the Secretary of Agriculture could impartially administer the amendment; 6) it would be nearly impossible to demonstrate undue price enhancement as a direct result of monopolization; 7) only large cooperatives would be exempted since smaller cooperatives were already free to merge. *See* 107 CONG. REC. 13,343 (statement of Sen. Kefauver), 13,344 (letter from Rep. Celler to Rep. Cooley), 13,353-54, 13,558 (1961) (statements of Sen. Kefauver).

<sup>96</sup> The amendment would bar challenges to a merger or acquisition which did not cause a price increase. This approach ignored a merger that created an unfair or anticompetitive result, which may harm other cooperatives but not cause a price increase. *See* 107 CONG. REC. 13,282 (1961) (letter from Rep. Celler to Rep. Cooley) (providing

ticularly in the area of antitrust protection from cooperatives.<sup>97</sup>

More specifically, the merger amendment was proposed to "[reaffirm] and [clarify] the original intent of the Capper-Volstead Act regarding the exclusive authority of the Secretary of Agriculture over the right of farmer cooperatives coming within the scope of that act . . . ."<sup>98</sup> However, the amendment's opponents argued it went beyond the congressional intent of the Capper-Volstead Act by extending the exemption to cooperative and corporate-cooperative mergers.<sup>99</sup> In response, the supporters said that the amendment authorizes neither "predatory practices" nor "blacklisting."<sup>100</sup>

Later in the debate, the supporters retreated from this position, arguing instead that the Capper-Volstead Act authorized

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several examples). The proposals would not help small, independent farmers. See 107 CONG. REC. 13,355 (1961) (statement of Sen. Kefauver) (providing the example in the *Milk Producers Ass'n* decision where the independent farmers were forced to ship their milk to Baltimore after the cooperative's acquisition of their processor).

<sup>97</sup> See 107 CONG. REC. 13,281 (1961) (letter from Rep. Celler to Rep. Cooley); 107 CONG. REC. 13,339-40 (1961) (statement of Sen. Kefauver). Critics believed that courts could have interpreted § 401(b) to allow cooperatives to act together in a manner which would have been illegal if the cooperative acted alone. See 107 CONG. REC. 13,350 (1961) (statement of Sen. Miller). See also 107 CONG. REC. 13,281 (1961) (letter from Rep. Celler to Rep. Cooley). Critics viewed the two proposals as nullifying the antitrust laws' application to cooperatives. See 107 CONG. REC. 13,353-54 (1961) (statement of Sen. Kefauver).

<sup>98</sup> S. REP. NO. 566, *supra* note 90, at 2320. Supporters argued that the large number of farmers keep commodity prices low. Compare 107 CONG. REC. 13,345 (1961) (statement of Sen. Long) (explaining that farmers, under the control of the Secretary, must act collectively to support prices) with note 13 *supra* and accompanying text (discussing the rationale behind antitrust protection for bargaining associations—bargaining strength).

<sup>99</sup> 107 CONG. REC. 13,340 (1961) (statement of Sen. Kefauver). Kefauver conceptualized the Capper-Volstead Act as allowing farmers to act collectively but did not believe the Act was intended to encompass joint actions by or agreements between cooperatives. *E.g., id.* (hypothetical illustrating this conceptualization). Legislative history on this issue, however, is not as clear as Kefauver believed. See note 65 *supra* and accompanying text.

<sup>100</sup> 107 CONG. REC. 13,342 (1961) (statement of Sen. Long). See also 107 CONG. REC. 13,344-45 (1961) (statements of Sen. Proxmire). This argument was inconsistent with the amendment's purpose of overruling the *Milk Producers Ass'n* decision. See note 93 *supra* and accompanying text. Kefauver argued that the Department of Justice had no jurisdiction under § 401(b) to proceed against cooperatives engaging in predatory practices. See 107 CONG. REC. 13,345 (1961). See also 107 CONG. REC. 13,348 (1961) (statements of Sens. Holland and Kefauver) (legislative history concerning the Department of Justice enforcement limited to Congressional Record references since the Department of Justice representative made his statements at closed hearings); 107 CONG. REC. 13,352 (1961) (statement of Sen. Pastore) (Later courts will be left on their own to determine the effect of amendment).

cooperatives to monopolize.<sup>101</sup> The proponents also argued that since "friendly" regulators examine the antitrust aspects of other industries—for example banks and railroads—the Department of Agriculture should be allowed to decide antitrust issues of cooperatives.<sup>102</sup> Additionally, if a monopolistic agricultural cooperative were to grow too large, Congress could legislate to remedy that situation.<sup>103</sup>

The amendment authorizing mergers under the regulatory control of the Department of Agriculture failed.<sup>104</sup> In addition, although the cooperative joint action amendment passed the Senate,<sup>105</sup> the Conference Committee deleted the proposal because it felt the amendment was unnecessary since the Capper-Volstead Act authorized joint action.<sup>106</sup> A year later, the Supreme Court confirmed the Committee's

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<sup>101</sup> Congress, in the Capper-Volstead Act, recognized it was conveying power to those associations to monopolize prices in an area, if they could. If they did, and a price got out of line, the Secretary of Agriculture had the power to protect the public and bring the price down to where it ought to be.

107 CONG. REC. 13,342-43 (1961) (statement of Sen. Long). *See also* 107 CONG. REC. 13,345 (1961) (statement of Sen. Aiken) (willing to allow cooperatives monopolization) (1961) (statement of Sen. Long) ("Some day I hope we may find that the farmers will work together to such an extent that it will be necessary for the Secretary of Agriculture to move in to tell them they are getting too much."). The power to monopolize was apparently based on the 1930 Attorney General's opinion. *See* 107 CONG. REC. 13,350-51 (1961) (statements of Sens. Holland and Long). For criticism of this opinion see note 40 *supra*. When Senator Long asked Senator Kefauver to provide an example where a cooperative merger had driven competitors out of the market, Kefauver responded: "Then why legislate? If it will never happen—and I grant it may never have happened in the past—I do not see any necessity for section 401(b)." 107 CONG. REC. 13,343 (1961).

<sup>102</sup> *See, e.g.*, 107 CONG. REC. 13,561-62 (1961) (statement of Sen. Proxmire). *But see* note 93 *supra* (discussing the distinction between a regulated industry where all firms are regulated and agriculture where only cooperatives would be regulated).

<sup>103</sup> 107 CONG. REC. 13,346 (1961) (statement of Sen. Holland) (providing example of past remedial legislation concerning the Sunkist Growers). *But see* 107 CONG. REC. 13,346 (1961) (statement of Sen. Kefauver) (questioning the fairness and timeliness of this mechanism).

<sup>104</sup> 107 CONG. REC. 13,564 (1961). A later attempt to pass a revised version of the amendment also failed. *See* 107 CONG. REC. 13,584 amendment table (d) (1961).

<sup>105</sup> 107 CONG. REC. 13,364 (1961). *See also* 107 CONG. REC. 13,557 (1961) (Subsequent attempt to amend this proposal failed.).

<sup>106</sup> The committee of conference hereby reaffirms . . . the national policy of aiding and encouraging the organization, operation, and sound growth of farmer cooperatives to the end that the farmers of the Nation may through group action conduct their business operations effectively to obtain a fair share

belief.<sup>107</sup>

Neither proposed amendment became law; nevertheless, the debates demonstrated general congressional approval of the cooperative movement.<sup>108</sup> Although not citing these congressional debates, subsequent court decisions reflect the general philosophy of approval of cooperative actions.

### III. DECISIONS SINCE 1961

There have been a number of decisions analyzing the Capper-Volstead Act's exemption since 1961. Before analyzing this case history, however, it is necessary to determine the types of behavior which constitute "predatory practices."<sup>109</sup> Predatory conduct has been

defined as conduct which has the purpose and effect of advancing the actor's competitive position, not by improving the actor's market performance, but by threatening to injure or injuring actual or potential competitors, so as to drive or keep them out of the market, or force them to compete less effectively.<sup>110</sup>

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of the Nation's income.

The committee of conference construes existing provisions of law to mean that two or more cooperative associations, as defined in the Agricultural Marketing Act of 1929, as amended, may act jointly in a federation of such cooperative associations, or through agencies in common, in performing those acts which farmers acting together in one such association may lawfully perform.

CONF. REP. No. 839, 87th Cong., 1st Sess. 37, reprinted in 1961 U.S. CODE CONG. & AD. NEWS 2243, 2332.

<sup>107</sup> See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. at 29 (holding that three cooperatives were in practical effect one association so that in their interorganizational dealings they were immune from the antitrust laws).

<sup>108</sup> See notes 88-103 *supra* and accompanying text.

<sup>109</sup> *Maryland & Virginia Milk Prod. Ass'n v. United States*, 362 U.S. 458, 467 (1960). See generally *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 631 n.31 (M.D. Ga. 1981) (discussing lay, scholarly and judicial definitions of this phrase), *aff'd*, 715 F.2d 520 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 1327 (1984).

<sup>110</sup> L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 43, at 108 (1977) (definition in a general business context, not an agricultural cooperative context). See also *Capper-Volstead Act*, *supra* note 9, at 445-46. There should be a liberal interpretation of the Capper-Volstead Act by reference "(1) to the common legitimate business practices of regular business corporations today and (2) to the fundamental and realistic principles necessary for a business also to be a cooperative organization." *Id.* The reason for this type of interpretation is that the Capper-Volstead Act was passed to allow cooperatives to function in a business-like manner. See *id.*

This definition is consistent with the use of the phrase in *Milk Producers Association*, where the Court stated a cooperative must not "achieve monopoly by preying on independent producers."<sup>111</sup>

There are two characteristics of predatory conduct. First, there is something odd or unnatural about the behavior—conduct that is not normal business conduct. This characteristic requires investigation into the mores of the market place to determine whether one can describe the conduct as fair or normal.<sup>112</sup> Second, predatory conduct has an identifiable target, a class of competitors. This characteristic is inherent in predatory conduct since it causes only competitors to have greater losses (or less profits) than they can afford.<sup>113</sup>

Although definitions are useful, they only make sense in the context of real world situations.<sup>114</sup> In *Gulf Coast Shrimpers and Oystermans Association v. United States*,<sup>115</sup> decided before *Milk Producers Association*, the court denied the immunity provided in the Fisherman's Collective Marketing Act<sup>116</sup> to a fisherman's cooperative.<sup>117</sup> The court denied immunity because the cooperative excluded all people from the market who did not buy or sell in accordance with its fixed prices. This coerced membership constituted a predatory practice.<sup>118</sup>

In *Otto Milk Co. v. United Dairy Farmers's Cooperative Association*,<sup>119</sup> a competitor lost money because of the cooper-

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<sup>111</sup> 362 U.S. at 467. The association had argued that its activities had a business purpose and not primarily an anticompetitive purpose. This is the same distinction the Sullivan definition makes between an improvement in competitive position due to market performance and one due to threats or force against a competitor. L. SULLIVAN, *supra* note 110, § 43, at 111-12. *But see* 512 F. Supp. at 631 n.31 ("There is a trend towards stretching the word predatory so as to let it include less pejorative conduct; for instance, conduct may be classified predatory if it evidences an intent unnecessarily, unreasonably, or illegally, to exclude a competitor from a market.").

<sup>112</sup> *See* L. SULLIVAN, *supra* note 110, § 43, at 111-12.

<sup>113</sup> *See id.* at 112.

<sup>114</sup> In a noncooperative situation, the Tenth Circuit recognized the necessity of context in order to understand the term, predatory. "The term probably does not have a well-defined meaning in the context it was used, but it certainly bears a sinister connotation." *Telex Corp. v. International Business Machs. Corp.*, 510 F.2d 894, 927 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

<sup>115</sup> 236 F.2d 658 (5th Cir.), *cert. denied*, 352 U.S. 927 (1956).

<sup>116</sup> 15 U.S.C. § 521 (1982).

<sup>117</sup> *See* 236 F.2d at 665.

<sup>118</sup> *See id.*

<sup>119</sup> 388 F.2d 789 (3d Cir. 1967) (permanent injunction granted, preventing future picketing and boycotts), *aff'g*, 261 F. Supp. 381, 386 (W.D. Pa. 1966).



ative's pickets<sup>120</sup> during an attempt to stop the plaintiff's area sales and monopolize the area. The cooperative wanted to sever the plaintiff's retail connections because the plaintiff would not concede to the defendant's demands.<sup>121</sup> The court found that the defendant intended to destroy its major competitor and take over the area<sup>122</sup> and held the boycott alone was sufficient to deny Capper-Volstead immunity to the cooperative.<sup>123</sup>

In certain circumstances, boycotts and pickets are tortious threats or attacks upon persons or property and are obviously predatory. Less obvious are those acts involving pricing, advertising, or purchasing policy since there is no "bright-line" in these areas between normal competitive efforts and predatory practice aimed at excluding competitors from the market.<sup>124</sup> An example of this subtleness is found in *Knuth v. Erie-Crawford Dairy Cooperative Association*.<sup>125</sup> The plaintiffs, as a class, were

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<sup>120</sup> *Id.* at 797 (losses amount to \$3,600 per week). Although the cooperative picketed against innocent third parties (the area grocers), their purpose was to create pressure on the grocers to stop purchases of the plaintiff's processed milk. The pickets were successful. *See id.* at 793, 797.

Since picketing was useful in the bargaining process and public policy favored cooperative marketing, one writer predicted that peaceful use of pickets, for the purpose of recognition or building pressure during negotiations, should be allowed. *See Antitrust and Agricultural Cooperatives*, *supra* note 9, at 521-22. One court agreed:

The "embattled farmers" . . . are therefore simply making a successful "adjustment" to the surroundings of their modern cultural milieu when they dramatize their claims by demonstrations. Their standing is not inferior to that of either protesting groups merely because they did not hire Mike Quill or Martin Luther King to serve as impressario of their show.

*Isaly Dairy Co. v. United Dairy Farmers*, 250 F. Supp. 99, 102 (W.D. Pa. 1966).

<sup>121</sup> 388 F.2d at 797. Complete monopolization was not necessary, since there was a tendency toward monopolization or a reasonable likelihood of substantial lessening of competition. This justified injunctive relief. *See* 261 F. Supp. at 385 (citing *United States v. Penn-Olin Co.*, 378 U.S. 158 (1964)).

<sup>122</sup> *See* 388 F.2d at 797. There is a distinction between the two *United Dairy Farmers* cases. In the first case, the court characterized the suit as an effort to conduct collective bargaining in the guise of an antitrust suit. The second suit involved the combination of the *United Dairy Farmers* and another cooperative to engage in the boycott and picket in order to persuade retailers to buy the defendant's milk. This explains the divergence in language concerning boycotts and pickets. *See id.* at 796-97.

<sup>123</sup> *Id.* at 798. *See also* *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 195 (5th Cir. 1965) (cooperative promoting boycotts by grocers and consumers of the plaintiff's product), *cert. denied*, 382 U.S. 977 (1966).

<sup>124</sup> *See* L. SULLIVAN, *supra* note 110, § 43, at 112-13.

<sup>125</sup> 395 F.2d 420 (3d Cir. 1968). Although this case does not directly examine the scope of the Capper-Volstead Act, it does examine price discrimination as a predatory practice. *See id.* at 423-24.

Pennsylvania members of the defendant-cooperative.<sup>126</sup> The cooperative also received milk from out-of-state farmers. The cooperative sold the out-of-state milk to processors at a lower price, since Pennsylvania milk had a floor price set by the state, while foreign milk did not.<sup>127</sup> In the complaint, the Pennsylvania farmers alleged the cooperative's practice of giving rebates to processors who used Pennsylvania milk constituted discriminatory price fixing by the cooperative and the processors, as the farmers believed they would get full price for their milk.<sup>128</sup> The appellate court recognized discriminatory pricing as a predatory act and reversed the dismissal of the complaint.<sup>129</sup> The case is subtle because, at first blush, it appears that this practice helped the plaintiff-class by promoting Pennsylvania milk sales. With the rebates, the processors had an incentive to purchase the Pennsylvania milk.<sup>130</sup> The complaint alleged there had been discriminatory pricing, coupled with the harm to the plaintiffs, who as cooperative members should have received the rebate money. This allegation was sufficient to state a claim.<sup>131</sup> The net effect of the predatory practice is unclear since the appellate court was only reviewing the propriety of the complaint's dismissal.<sup>132</sup>

An example of a poorly reasoned case is *North Texas Producers Association v. Metzger Dairies*.<sup>133</sup> In this case, the court merely cited the definition of "predatory conduct,"<sup>134</sup> stated the facts,<sup>135</sup> and concluded "that the jury could reasonably find from the evidence that the Association engaged in monopolistic practices or attempts to monopolize proscribed by section 2 of the

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<sup>126</sup> *Id.* at 422.

<sup>127</sup> *See id.*

<sup>128</sup> *See id.* at 423-24.

<sup>129</sup> *See id.* at 423, 424. *See also* Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1044 (2d Cir. 1980) (citing *Knuth* as support for the proposition that discriminatory pricing can be monopoly power used in a predatory fashion), *cert. denied*, 454 U.S. 818 (1981).

<sup>130</sup> *See* 395 F.2d at 422-24.

<sup>131</sup> *See id.* at 424.

<sup>132</sup> *See id.* at 422-23. The court applied a very lax standard to determine the sufficiency of the complaint. *See id.* at 423.

<sup>133</sup> 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966).

<sup>134</sup> *See id.* at 192, 193-94.

<sup>135</sup> In this case, the cooperative supplied 85-90% of the raw milk marketed in the Dallas-Fort Worth, Texas area. It also controlled nearly all of the milk transportation in the region. *See id.* at 194-96.

Sherman Act."<sup>136</sup> Unlike most recent cases, the court in *Metzger Dairies* did not thoroughly analyze the facts.<sup>137</sup> The cooperative-defendant was a marketing cooperative which owned and operated a surplus milk processing plant and owned or leased hauling trucks.<sup>138</sup> The plaintiff accused the cooperative of maintaining milk prices at a constant level even though the federal minimum price had fallen.<sup>139</sup> Independently, this should not be considered a predatory trade practice;<sup>140</sup> however, the methods the cooperative used to enforce this price clearly amounted to predatory acts.<sup>141</sup> The Association stopped selling milk to the plaintiff-dairy,<sup>142</sup> attempted to stop the dairy's alternative source of supply, attempted to purchase the dairy and organized a grocer boycott of the dairy's products. These acts constitute sufficient predatory conduct to deny Capper-Volstead immunity from the cooperative-monopoly.<sup>143</sup> The court should have relied on this type of factual analysis rather than its blunt but correct statement of the law.

Other issues concerning the scope of antitrust immunity include whether a cooperative may only market the product, whether a cooperative may completely monopolize an area, and

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<sup>136</sup> *Id.* at 196.

<sup>137</sup> See notes 202-301 *infra* and accompanying text.

<sup>138</sup> It is important to note that a cooperative's ownership of such facilities should not, by itself, strip the cooperative of its exemption. The Capper-Volstead Act protects cooperatives which collectively handle, process or market the products of their members. The Capper-Volstead Act not only permits such ownership, but actually encourages it. See Comment, *supra* note 7, at 98.

There is some uncertainty, however, as to whether cooperatives should be allowed to own handling, processing and marketing facilities and remain exempt from the antitrust laws. Size of the cooperative is not determinative. The nature of the cooperative's activities is determinative, *i.e.*, is the cooperative operating for the benefit of its producer members? See *id.* at 102. There may be some additional requirements: 1) the products handled must be the same as those grown, and 2) at least 51% of the amount handled must be grown by the members. See *Florida Citrus Mutual*, 53 F.T.C. 973, 975 (cooperative denied immunity because it operated for the benefit of grower-members, handlers, and processors, not just grower-members), *aff'd*, 53 F.T.C. 999 (1957).

<sup>139</sup> 348 F.2d at 194.

<sup>140</sup> See, *e.g.*, *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 715 F.2d 30, 31-32 (2d Cir. 1983) (Maintaining higher pricing is not a predatory practice unless it damages or destroys competition.).

<sup>141</sup> Enforcement was necessary because the plaintiff-dairy refused to capitulate to the cooperative. The dairy used its own high-cost trucks to haul milk. 348 F.2d at 195.

<sup>142</sup> The refusal to deal would be a sufficient act to preclude Clayton or Capper-Volstead protection. See *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 521.

<sup>143</sup> See 348 F.2d at 196.

whether a cooperative may fix prices. The court, in *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods*,<sup>144</sup> said that a cooperative which only bargained with a purchaser, may receive Capper-Volstead immunity.<sup>145</sup> The court relied on the statutory language allowing cooperatives to have common marketing agents.<sup>146</sup> If the Act authorizes a separate common marketing agent, then clearly two associations may jointly market and contract to achieve their legitimate goals.<sup>147</sup> The processor-plaintiff argued, however, that the cooperative should be denied Capper-Volstead Act immunity since it did none of the Act's listed functions.<sup>148</sup> The court rejected this argument, saying an association, whose principal function was to bargain the price and contract conditions, was engaged in "marketing."<sup>149</sup> "[Bargaining] necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes."<sup>150</sup> The court believed that bargaining cooperatives, therefore, needed a more liberal construction of the Capper-Volstead Act than handling cooperatives.<sup>151</sup>

Closely related to the bargaining cooperative issue is whether the Capper-Volstead Act immunizes an intracooperative conspiracy. In *Schoenberg Farms v. Denver Milk Producers*,<sup>152</sup> the complaint alleged an intracooperative conspiracy. Since section 1 of the Sherman Act prohibits those conspiracies in restraint of trade between *separate* business entities, the court found the

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<sup>144</sup> 497 F.2d 203 (9th Cir. 1974).

<sup>145</sup> See *id.* at 215.

<sup>146</sup> See *id.* at 214-15. "Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes." 7 U.S.C. § 291 (1982).

<sup>147</sup> See *id.* at 214. See also *Sunkist Growers v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962) (concluding that separate organization does not preclude the growers from being considered as one organization for the purposes of the exemptions). The *Ore-Ida* court also relied on the Cooperative Marketing Act of 1926, 7 U.S.C. § 455 (1982). See 497 F.2d at 214.

<sup>148</sup> 497 F.2d at 214. The court rephrased the issue: "[M]ust associations engage in the sale of potatoes in order to be considered as engaged in 'marketing?'" *Id.* at 215.

<sup>149</sup> See *id.* at 215.

<sup>150</sup> *Id.* These are characteristics of the definition of marketing. See *id.* (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY (1953) (marketing)).

<sup>151</sup> See *id.* at 215-16 (quoting *The Capper-Volstead Act*, *supra* note 9, at 450-51).

<sup>152</sup> 231 F. Supp. 266 (D. Colo. 1964).

complaint to be fatally defective.<sup>153</sup> Although the court based its decision on sections 1 and 2 of the Sherman Act,<sup>154</sup> the reasoning was consistent with *Sunkist Growers v. Winckler & Smith Citrus Products Co.*<sup>155</sup> and *Treasure Valley Potato Bargaining Association* language about looking at the substance of the organization, not the form. Courts apply the antitrust laws only when the cooperative's conspiracy is with a nonexempt person.<sup>156</sup>

Another related issue is the legality of an intercooperative merger, involving the merger of two independent cooperatives as well as intercooperative agreements. The *Milk Producers Association* decision is not apposite since it involved the acquisition of a noncooperative by a cooperative.<sup>157</sup> The *Winckler & Smith Citrus Products Co.* opinion also is not determinative since that Court viewed the agreements as only intracooperative agreements.<sup>158</sup> A district court has held that the Capper-Volstead Act exempts intercooperative agreements;<sup>159</sup> however, this may not apply to price fixing agreements.<sup>160</sup> The district court's reasoning is nonetheless sound for intercooperative mergers.<sup>161</sup> In addition,

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<sup>153</sup> See *id.* at 269-70.

<sup>154</sup> See *id.* at 270.

<sup>155</sup> 370 U.S. 19.

<sup>156</sup> [N]othing . . . suggests that a corporate officer can be regarded as a conspirator with his fellow officers and his own corporation in violation of the conspiracy provision of Section 2 when he merely acts as an officer to establish the policy and advance the interests of the corporation—and this is so even when the policy of the corporation is to monopolize.

231 F. Supp. at 270.

<sup>157</sup> See Comment, *supra* note 7, at 93.

<sup>158</sup> 370 U.S. at 29.

<sup>159</sup> *United States v. Maryland Coop. Milk Prod., Inc.*, 145 F. Supp. 151 (D.D.C. 1956). The court reasoned that since the Capper-Volstead Act allowed cooperatives to have common marketing agents, it must have been contemplated that cooperatives could jointly fix prices. See *id.* at 154. Additionally, since the members of the two cooperatives could have formed one large cooperative, holding an intercooperative agreement illegal would place form over substance. See *id.*

<sup>160</sup> See Mahaffie, *supra* note 9, at 440-41. The Supreme Court in *Winckler & Smith Citrus Prods. Co.* did not use the *Maryland Coop. Milk Prod., Inc.* court's reasoning or cite the case. Rather, the Court emphasized the lack of economic significance in the existence of three separate entities. See *id.* Congress did not intend to exempt pricing agreements. The fact that cooperatives could become one cooperative is irrelevant because, in fact, they are separate. That separateness is meaningful because the Court emphasized that Sunkist's use of three entities had no economic significance and that outsiders were not deceived. See *id.* at 441.

<sup>161</sup> *Id.* at 441. Separateness between cooperatives is not so important in mergers as in price agreements. See *id.* *Maryland Coop.* was cited by the Supreme Court in *Milk Producers Ass'n.* See 362 U.S. at 472 (dictum). See also Comment, *supra* note 7, at 93 (discussing whether the citation means that intercooperative activity is a per se violation of the antitrust laws or whether the "legitimate object" test will be applied on a case-by-case basis).

recent cases, at least philosophically, support immunity for intercooperative mergers.<sup>162</sup>

There is little case law concerning cooperative production restrictions. What law there is demonstrates judicial reluctance to allow a cooperative to have this authority.<sup>163</sup> Despite this reluctance, there are good reasons to allow immunity for production restrictions.<sup>164</sup> Production limitation as a predatory act depends upon the specific fact pattern.<sup>165</sup> Is it not a normal activity with the product?; is the entity against whom the act is directed, a competitor of the cooperative? The better way to view production limitations is as an enforcement mechanism supporting a price increase to the purchaser of the cooperative's products.<sup>166</sup>

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<sup>162</sup> See notes 192-253 *infra* and accompanying text.

<sup>163</sup> See *Antitrust Agricultural Cooperatives*, *supra* note 9, at 515 (citing *California Bean Growers' Ass'n v. Rindge Land & Navigation Co.*, 248 P. 658 (Cal. 1926)); *Tobacco Growers' Co-op. Ass'n v. Jones*, 117 S.E. 174 (N.C. 1923); *Stark County Milk Prod. Ass'n v. Tabeling*, 194 N.E. 16 (Ohio 1934); *List v. Burley Tobacco Growers' Co-op. Ass'n*, 151 N.E. 471 (Ohio 1926); *Washington Cranberry Growers Ass'n v. Moore*, 201 P. 773 (Wash. 1921), *aff'd on reh'g*, 204 P. 811 (Wash. 1922)); Note, *supra* note 9, at 536 n.57. The Department of Justice also believes that agreements among cooperative members to limit production would be illegal. Comment, *supra* note 7, at 101. The thesis of the argument against cooperative production restrictions is that only the government has power to control production. When Congress provided for production restrictions in the Agricultural Marketing Act, it also provided that such action would not violate the antitrust laws. *Id.* The Agricultural Adjustment Act of 1938 shows the legislative intent that production limits be accomplished through regulation and not by groups of farmers. Mahaffie, *supra* note 9, at 439.

<sup>164</sup> The following reasons have been postulated: 1) Cooperatives must have control over supply in order to have control over price; 2) The Capper-Volstead Act's language would not be tortured if "preparing for market" included production; 3) If one considers a cooperative and its members as one economic entity, that entity should be able to regulate production as do other enterprises; 4) The public interest is protected by the § 2 remedy against undue enhancement of prices. See *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 515-16. See also Comment, *supra* note 7, at 101. If cooperatives do not have the right to control production, then courts are in the position of being agricultural planners, even though a court cannot force production in other sectors of the economy. Cooperatives would find methods by which to evade the law. *Id.*

<sup>165</sup> Comment, *supra* note 7, at 101.

<sup>166</sup> Production limits and their resulting high prices, however, will probably be ineffective in the long-run, given the economic characteristics of farming.

Some economists have maintained that this might permit a possibility of abuse and permit a monopoly. But a farmer's monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by over production in the following years. No other industry except agriculture has this automatic safeguard.

61 CONG. REC. 2058 (1922) (statement of Sen. Capper).

Likewise, there is little case law about exclusive dealing contracts between cooperatives and their members. Generally, the contracts run for a limited time and the members have a reasonable time to terminate their agreements. These contracts should not be held to violate the antitrust laws.<sup>167</sup> However, if this form of contract is used as a weapon, *i.e.*, preventing entry into the market, then a court should consider this to be a predatory practice.

#### IV. POLICY REFLECTION DURING THE 1970s

During the late 1970s, a noticeable shift in attitudes towards agricultural cooperatives occurred—cooperatives were no longer perceived as requiring the entire protection of the Capper-Volstead Act.<sup>168</sup> The economic realities of the 1920s, which justified the Capper-Volstead immunity then, did not exist in the 1970s.<sup>169</sup> Cooperatives had obtained large market power through merger and federation.<sup>170</sup> Although economic theory postulated that a monopoly could not occur in the agricultural industry,<sup>171</sup> market defects have precluded a competitive industry.<sup>172</sup> Additionally, since the 1920s, changes in the agricultural commodity marketing system decreased the need for marketing cooperative activities.<sup>173</sup> For these reasons, at least one commentator has concluded that Congress should narrow the scope of the Capper-Volstead Act.<sup>174</sup>

The National Commission for the Review of Antitrust Laws and Procedures also recommended the Act's scope be construed narrowly.<sup>175</sup> The Commission recommended that "mergers, marketing agencies in common, and similar agreements among co-

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<sup>167</sup> See notes 110-113 *supra* and accompanying text.

<sup>168</sup> See notes 169-201 *infra* and accompanying text.

<sup>169</sup> See Note, *supra* note 4, at 344-52, 360-67.

<sup>170</sup> See *id.* at 344-46.

<sup>171</sup> See *id.* at 347-49.

<sup>172</sup> See *id.* at 349-52.

<sup>173</sup> See *id.* at 360-67. The changes since 1920 include better market information dissemination; coordination of farming activity from planting to harvesting; use of commodity futures to control price swings; and increased governmental control of agricultural production. See *id.*

<sup>174</sup> See *id.* at 388.

<sup>175</sup> See 1 NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 253-71 (1979) [Hereinafter cited as NATIONAL COMMISSION REPORT].

operatives should be allowed only if no substantial lessening of competition results."<sup>176</sup> Additionally, the Commission urged that the "undue price enhancement" language of section 2 of the Capper-Volstead Act be more precisely defined.<sup>177</sup> The Commission also concluded that section 2 enforcement should be separated from the promotional duties of the Department of Agriculture.<sup>178</sup>

The Commission based the proposals on its concern that the potential for cooperative monopoly had become a substantial threat to the marketplace.<sup>179</sup> Concentration in agricultural marketing had been increasing, particularly in the dairy, fruit and staple crop industries.<sup>180</sup> In addition, cooperatives had been able to circumvent traditional market restraints on their power.<sup>181</sup> The fact that cooperative monopolies might not be as effective as industrial monopolies did not convince the Commission that cooperative monopolies were any more desirable.<sup>182</sup>

Given this economic situation, the Commission believed the appropriate action was prevention and regulation.<sup>183</sup> The Commission felt prevention of the development of monopoly power could be achieved by subjecting cooperative mergers to Clayton Act analysis.<sup>184</sup> Since the economic effect of federated cooperatives and common marketing agencies currently authorized by the Capper-Volstead Act is the same as a merger, to avoid circumvention of the Clayton Act, they should be subject to the same competitive scrutiny as a merger.<sup>185</sup>

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<sup>176</sup> *Id.* at 253.

<sup>177</sup> *Id.*

<sup>178</sup> *See id.* It is interesting to note that this recommendation is the exact opposite of the 1961 Senate merger amendment which would have placed exclusive regulatory jurisdiction in the Department of Agriculture. *See* notes 91-93 *supra* and accompanying text. The Commission also suggested the Secretary of Agriculture consider competitive factors in the agricultural marketing order and agreement system. *See* NATIONAL COMMISSION REPORT, *supra* note 171, at 253. Further discussion of this regulatory system is beyond the scope of this Note.

<sup>179</sup> *See* NATIONAL COMMISSION REPORT, *supra* note 171, at 258-29.

<sup>180</sup> *See id.* at 259.

<sup>181</sup> *See id.*

<sup>182</sup> *See id.*

<sup>183</sup> *See id.* at 260.

<sup>184</sup> *See id.* at 261. Clayton Act scrutiny would maximize competition without undue hardship upon cooperatives. *Cf. id.*

<sup>185</sup> *Id.* at 262.



Regulation through more effective use of section 2 of the Capper-Volstead Act would also ensure no abuse of the monopoly power generated by internal cooperative growth.<sup>186</sup> Regulation of this form of monopoly power is superior to prevention since prevention of such power may impair the ability of a cooperative to achieve its legitimate goals.<sup>187</sup> By precisely defining the scope of section 2 and separating the Department of Agriculture's enforcement function from its promotional function, effective regulation of self-generated monopoly power could occur.<sup>188</sup>

Agricultural economists were also generally critical of the cooperative system.<sup>189</sup> One economist suggested that cooperatives should restrict their economic power<sup>190</sup> and operate within the marketing order system.<sup>191</sup> This was especially true given the public reaction to the dairy cooperatives' involvement in the Watergate affair.<sup>192</sup> There was also strong criticism of the cooperatives' business experiments<sup>193</sup> and market power.<sup>194</sup> Another

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<sup>186</sup> See *id.*

<sup>187</sup> See *id.* Prevention would be difficult to administer. Also, the risk of creation of monopoly power through internal growth is lower. *Id.*

<sup>188</sup> See *id.* at 263.

<sup>189</sup> See generally AGRICULTURAL COOPERATIVES AND THE PUBLIC INTEREST (Marion ed. 1977) (symposium of agricultural economists) [hereinafter cited as AGRICULTURAL COOPERATIVES].

<sup>190</sup> See Breimyer, *The Capper-Volstead Act: A Historical and Philosophical Assessment*, in AGRICULTURAL COOPERATIVES, *supra* note 189, at 8.

<sup>191</sup> See *id.* This economist, however, warned against conceptual preoccupation with cooperatives since their difficulties are merely symbolic of the entire economy's difficulties. See *id.* at 8-9.

<sup>192</sup> "During the 1970s, agricultural cooperatives have been besieged by an unprecedented series of criticisms. Implicated in the political influence peddling scandal of the Watergate era, the large dairy cooperatives also soon found themselves defendants in several antitrust cases brought by the Justice Department." Marion, *Editor's Introduction* to AGRICULTURAL COOPERATIVES, *supra* note 189, at i.

<sup>193</sup> "Cooperatives were also experimenting with a variety of business arrangements with their producer members and their customers. Several joint ventures were tried such as Heublein-United Vintner and Minute Maid-Florida Orange Marketeers. These met with mixed results and strong criticisms from some quarters." *Id.*

<sup>194</sup> The market power of cooperatives and their ability to unduly enhance price was examined in a report developed by the Federal Trade Commission and in hearings conducted by the House Judiciary Committee. Other government or academic investigations attempted to evaluate the influence of instruments of trade and coordination—such as marketing orders and full supply contracts—when these were used by marketing cooperatives.

*Id.*

economist noted that changes in the farm sector of the economy may make immunity inappropriate.<sup>195</sup> Additionally, the change in the cooperative's capital structure now makes it more like an agribusiness than a cooperative.<sup>196</sup> Other economists expressed concern about the effectiveness of bargaining cooperatives in influencing commodity prices.<sup>197</sup> Another demonstrated that the antitrust laws should not distinguish between open and closed membership cooperatives.<sup>198</sup> Despite this general criticism, two economists did conclude that the present legal structure was the appropriate policy approach to agricultural cooperatives.<sup>199</sup>

## V. LITIGATION SINCE THE REFLECTION

Despite the uncertain need for cooperative antitrust immunity, the courts have continued to construe the Capper-Volstead Act liberally. This was consistent with earlier precedent and the Senate's understanding of the Act in 1961.<sup>200</sup> Two courts, however, did interpret the Act restrictively, although neither cited specific policy reasons for doing this.<sup>201</sup>

One of the more frequent recent issues is whether a cooperative may maintain a monopoly when that monopoly is not achieved through predatory acts. The watershed case in this area is *Fairdale Farms v. Yankee Milk [Fairdale I]*,<sup>202</sup> in which the court recognized the "inherent conflict" between section 2 of the Sherman Act, making it unlawful for a person to monopolize, and the Capper-Volstead Act, authorizing the collective

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<sup>195</sup> Cf. Raup, *Cooperatives, Capper-Volstead and the Organization and Control of Agriculture*, in AGRICULTURAL COOPERATIVES, *supra* note 189, at 12-14.

<sup>196</sup> *Id.* at 14-17.

<sup>197</sup> See Garoyan & Thor, *Observations on the Impact of Agricultural Bargaining Cooperatives*, in AGRICULTURAL COOPERATIVES, *supra* note 189, at 145.

<sup>198</sup> See Youde, *Cooperative Membership Policies and Market Power*, in AGRICULTURAL COOPERATIVES, *supra* note 189, at 224.

<sup>199</sup> Masson & Eisenstat, *Capper-Volstead and Milk Cooperative Market Power: Some Theoretical Issues*, in AGRICULTURAL COOPERATIVES, *supra* note 189, at 67.

<sup>200</sup> See notes 88-105 *supra* and accompanying text.

<sup>201</sup> See notes 269-98 *infra* and accompanying text.

<sup>202</sup> 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981). Fairdale Farms' complaint alleged violation of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), since Yankee Milk and the Regional Milk Marketing Agency, Inc. had conspired to fix the price of raw milk and had monopolized and attempted to monopolize the raw milk trade in the area where Fairdale procured its milk. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 715 F.2d 30, 31 (1983), *cert. denied*, 104 S. Ct. 711 (1984).

actions of farmers.<sup>203</sup> The very phrasing of the Capper-Volstead Act leaves no doubt that farmers may combine into cooperative monopolies of any size without judicial interference.<sup>204</sup> The issue before the court was whether the Capper-Volstead Act protected Yankee Milk and six other cooperatives which organized the Regional Cooperative Marketing Agency, Inc.<sup>205</sup>

The court upheld the right to organize in this manner (assuming no predatory conduct) for several historical reasons. First, the Sherman Act originally was to have a section which exempted cooperatives from its provisions;<sup>206</sup> however, Congress, without explanation, omitted this section from the Act.<sup>207</sup> Second, the legislative history of the Capper-Volstead Act showed that Congress recognized that a cooperative whose membership constituted as much as ninety-three percent of the growers of a particular commodity would be legal under the Capper-Volstead Act.<sup>208</sup> Third, congressmen believed that farmers needed this

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<sup>203</sup> See 635 F.2d at 1040. This conflict has long been recognized. See also Note, *supra* note 9, at 531 & n.32 ("The status of agricultural cooperatives, in relation to the federal antitrust laws, is . . . unique.").

<sup>204</sup> See 635 F.2d at 1040. The court noted that the Secretary of Agriculture had the authority to issue cease and desist orders if the cooperative monopolizes and restrains trade to the extent that a commodity's price is "unduly enhanced." *Id.* One court had stated that a single cooperative may acquire 100% of the relevant market. See *Cape Cod Food Prods. v. Nat'l Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass. 1954). However, there is a natural restraint against such a giant cooperative. Farmers and ranchers are traditionally independent and believe in local control of their affairs. They are hesitant to delegate authority to make marketing decisions, especially to a distant authority. See *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 512.

<sup>205</sup> See 635 F.2d at 1038. The Agency's function was to establish prices for the individual members' milk. *Id.* at 1039.

<sup>206</sup> See *id.* at 1041.

<sup>207</sup> See *id.* *Contra* LEGAL PHASES, *supra* note 6, at 277 (the amendment was defeated); Note, *supra* note 9, at 526 (amendment defeated because it was felt that farmers inherently could not monopolize their industry). The proposed amendment stated: "Provided, That this act shall not be construed to apply to . . . any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products." 21 CONG. REC. 2611 (1890), *quoted in* Recent Developments, *supra* note 1, at 399 n.13. Since the amendment applied only to § 1 of the Sherman Act and made no attempt to exempt cooperatives from the antimonopoly provisions of the Sherman Act, "it was contemplated even at this early date that although cooperatives would be free to form, they would not be at liberty to monopolize." Recent Developments, *supra* note 1, at 399 n.13.

<sup>208</sup> See 635 F.2d at 1041. *Contra* Recent Developments, *supra* note 1, at 407-10 & nn.65-81. This conflict in legislative history is due to the simple fact that the legislative history is conflicting. See notes 59, 65 *supra*.

help, especially after the agricultural depression of 1920, and President Harding also supported efforts to help cooperatives.<sup>209</sup> Fourth, later legislation demonstrated congressional willingness to strengthen cooperative associations.<sup>210</sup>

The court also looked to the Supreme Court and the Federal Trade Commission for guidance.<sup>211</sup> The Supreme Court had apparently approved a district judge's jury charge that a cooperative may legally have a monopoly of its relevant product.<sup>212</sup> Noting that if any organization would be opposed to a monopolistic cooperative it would be the Federal Trade Commission, the court quoted Commission language stating that, if it used no predatory practices, a cooperative may legally attain 100 percent of a market.<sup>213</sup> The court itself also emphasized the legal restraint upon obtaining the monopoly—the prohibition against using predatory trade practices.<sup>214</sup> For these reasons, the appellate court held that the district court's reliance<sup>215</sup> upon *United*

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<sup>209</sup> See 635 F.2d at 1041-43.

<sup>210</sup> See *id.* at 1042-43. This court did not place much emphasis on the subsequent legislation despite its one page description of it. "It is apparent from these statutes that agricultural cooperatives were 'a favorite child of Congressional policy.'" *Id.* at 1043 (quoting 5 TOULMIN, ANTITRUST LAWS § 6.1, at 334 (1950)).

<sup>211</sup> See *id.* at 1044.

<sup>212</sup> *Id.* at 1044 & n.6 (quoting *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 284 F.2d 1, 19 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962)). The court also quoted Supreme Court language indicating that farmers may act together under the Capper-Volstead Act which otherwise would be illegal under the antitrust laws. See *id.* at 1044 (quoting *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 465 (1960); *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 842 (1978) (White, J., dissenting)). But see Recent Developments, *supra* note 1, at 410-12.

<sup>213</sup> See 635 F.2d at 1044 (quoting *Food Price Investigation: Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary*, 93d Cong., 1st Sess. 715 (1973) (Bureau of Competition's response to questions)). See also 119 F. Supp. at 907 (Jury charge stated that a cooperative may acquire 100% of the market, "if it does it solely through these steps which involve cooperative purchasing and cooperative selling," but prohibited "predatory practice[s] . . . or . . . the bad faith use of . . . legitimate devices.").

<sup>214</sup> See 635 F.2d at 1044. See also Comment, *supra* note 7, at 100 (If the cooperative used illegal acts, the Federal Trade Commission and the Department of Justice would have jurisdiction to prosecute, and the Secretary of Agriculture could protect the consumer.).

<sup>215</sup> Relying on the *Grinnell* decision, the district court stated, "a plaintiff claiming [that] an agricultural cooperative has violated section 2 [of the Sherman Act] has no greater burden than if he sued a corporation." *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,029, at 77,117 (D. Vt. Nov. 2, 1979), *aff'd in part and rev'd in part*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981).

*States v. Grinnell*<sup>216</sup> was erroneous.<sup>217</sup> There are instances where a cooperative may willfully acquire or maintain monopoly power. The court also said the maintenance of monopoly power which is not the result of a superior product, business acumen or historic accident is a characteristic of a growing, powerful cooperative.<sup>218</sup> Additionally, the court held that the *Grinnell* decision does not apply to monopoly power from the "formation, growth and combination of agricultural cooperatives."<sup>219</sup> Unless Fairdale Farms could show predatory conduct by Yankee Milk on remand, then the case was to be dismissed.<sup>220</sup>

Following remand, the Second Circuit faced the same case three years later in *Fairdale Farms v. Yankee Milk [Fairdale II]*<sup>221</sup>. The court held that there had been no predatory practices by the cooperative.<sup>222</sup> The plaintiff alleged the defendant committed a predatory act by raising its price higher than the minimum price set by the federal government.<sup>223</sup> The court was

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<sup>216</sup> 384 U.S. 563 (1966). The *Grinnell* Court stated:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

*Id.* at 570-71.

<sup>217</sup> See 635 F.2d at 1040, 1044-45. The Second Circuit has been criticized for ignoring various pronouncements that cooperatives, once formed, are to be treated as corporations. See Recent Developments, *supra* note 1, at 397-98, 406-12 (criticizing the case for ignoring the legislative history and judicial treatment of the Capper-Volstead Act).

<sup>218</sup> See 635 F.2d at 1045. See also Recent Developments, *supra* note 1, at 405 n.61 (discussing the nature of the two theories behind a charge of monopolization, the power theory and the abuse theory).

<sup>219</sup> 635 F.2d at 1045. Of course, this power may not be acquired through predatory means. *Id.*

<sup>220</sup> *Id.* The case was remanded since it was not clear whether the district court denied the defendants' summary judgment motion on the ground that predatory acts had been shown or on the ground that Fairdale Farms, the plaintiff, would have to meet the *Grinnell* monopolization test. See *id.*

<sup>221</sup> See *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 715 F.2d 30 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 711 (1984). The first *Fairdale Farms* case will hereinafter be cited as *Fairdale I*; the second *Fairdale Farms* case will be cited as *Fairdale II*.

<sup>222</sup> See *id.* at 34.

<sup>223</sup> See *id.* at 31-32. The Agriculture Marketing Agreement Act of 1937 authorized the government to set minimum prices. See 7 U.S.C. § 608c(5) (1982). The *raison d'être* for bargaining cooperatives is to raise the price of farm products. See *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 513.

reluctant to examine cooperative pricing policies,<sup>224</sup> but did recognize the need to examine "competition-stifling practices."<sup>225</sup> The court stated that merely raising prices does not constitute a predatory practice.<sup>226</sup> In fact it has quite the opposite effect since, by raising the price of milk, the cooperative would encourage lower-priced producers to enter the market.<sup>227</sup> The plaintiff also argued that the price increase was a predatory practice against the consumer; however, the court disagreed saying the practice must be aimed at identifiable individuals, a group of competitors or potential competitors.<sup>228</sup> Initially, this analysis seems in conflict with the *Knuth v. Erie-Crawford Dairy Coop. Association*<sup>229</sup> analysis. In *Knuth*, the predatory act was aimed at the Pennsylvania cooperative members and not at the cooperative's competitors.<sup>230</sup> The cases can be harmonized, however, since the cooperative members are potential competitors of the cooperative.

The requirement that the predatory act be something other than an act which has the effect of increasing the price to the consumer is also consistent with the goal of the Capper-Volstead Act. This Act establishes farmer bargaining leverage over the purchasers of farm produce,<sup>231</sup> and thereby likely increases the product's consumer price. If these increases were "predatory," then the bargaining leverage the Capper-Volstead Act was to make legitimate would be a predatory practice. Therefore, the analysis in *Fairdale II* is quite consistent with this goal of the Capper-Volstead Act.

Another interesting issue frequently facing courts is whether refusal to supply commodities to a buyer under a contract con-

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<sup>224</sup> See 715 F.2d at 32.

<sup>225</sup> See *id.* (quoting Milk Producers Ass'n, 362 U.S. at 463). See also *United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939) (agreement with non-exempted parties to fix prices is illegal).

<sup>226</sup> See 715 F.2d at 32.

<sup>227</sup> See *id.* at 32-33. "It would be self-defeating for a cooperative to raise its prices when its share of the market is so small as to leave it without bargaining power." *Id.* at 33.

<sup>228</sup> *Id.* at 32 (citing *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); 635 F.2d at 1044 (*Fairdale I*) and quoting L. SULLIVAN, *supra* note 110, at 112)).

<sup>229</sup> 395 F.2d 420 (3d Cir. 1968).

<sup>230</sup> See notes 125-31 *supra* and accompanying text.

<sup>231</sup> See notes 5, 6, 9, 13 & 15 *supra*.

stitutes a predatory practice.<sup>232</sup> In *Fairdale II*, the cooperative threatened to stop delivering milk because of a price dispute involving one county of cooperative milk producers.<sup>233</sup> The court refused to declare this act to be a predatory practice for several reasons. First, the cooperative supplied only forty percent of the dairy's milk requirement. Second, an inexpensive alternative source of supply existed nearby. Third, the termination of the contract necessarily created an added market for the defendant's competitors.<sup>234</sup> Based on these facts, the court determined that this behavior was not an unlawful use of lawfully acquired monopoly power:

Section 2 of the Sherman Act does not give purchasers the exclusive right to dictate the terms upon which they will deal. Yankee, which did not have a monopoly covering both the New York and New England areas, lawfully might refuse to sell to a purchaser which would not meet its terms of sale and which had other sources of supply available.<sup>235</sup>

The court, in *Kinnett Dairies v. Dairymen, Inc.*,<sup>236</sup> gave a broader holding on this issue. A cooperative may refuse to deal with a customer if the cooperative does not have a monopoly in the product.<sup>237</sup> If a cooperative does have a monopoly, then it must not "engage in a refusal to deal upon reasonable terms . . . ." <sup>238</sup> Even if the cooperative were a monopoly, it may refuse to sell<sup>239</sup> if the purchaser does not meet the fair, reasonable and

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<sup>232</sup> See generally *Antitrust and Agricultural Cooperatives*, *supra* note 9, at 521 (providing a discussion of various fact patterns and the antitrust liability associated with each pattern's refusal to deal).

<sup>233</sup> 715 F.2d at 33.

<sup>234</sup> See *id.* at 33-34.

<sup>235</sup> *Id.* at 34.

<sup>236</sup> 512 F. Supp. 608 (M.D. Ga. 1981), *aff'd*, 715 F.2d 520 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 1327 (1984).

<sup>237</sup> See *id.* at 632.

<sup>238</sup> *Id.*

<sup>239</sup> An illegal refusal to deal would be one used to maintain the monopoly. See *id.* Accord 635 F.2d at 1044 (*Fairdale I*) (refusal to deal listed as a predatory practice if the cooperative has attained a monopoly; whereas, it would be harmless if attempted by a small farm cooperative) (quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (citations omitted)). See also Comment, *supra* note 7, at 91 ("A refusal to deal for any anticompetitive reason would probably be held to be outside the legitimate objectives of a cooperative.").

lawful conditions of the sales contract.<sup>240</sup> A cooperative's refusal to deal may be described as a boycott; however, such a label does not necessarily make the practice predatory. Rather, a refusal to sell at a lower price is a legitimate means of fulfilling the goal of the Capper-Volstead Act.<sup>241</sup> It is interesting to note that, before a refusal to deal is considered to be a predatory practice, there must be a finding that the cooperative is monopolistic. Proof of refusal to deal, therefore, does not independently give rise to antitrust liability.<sup>242</sup>

The monopolization problem presented in *Fairdale I* was even more extreme in *L. & L. Howell, Inc. v. Cincinnati Cooperative Milk Sales Association*.<sup>243</sup> In this case, the plaintiff hauled milk for the cooperative-defendants. Eighty to eighty-five percent of the farmers in the hauling area were members of one of the cooperatives. In 1972, the cooperatives decided to make a common arrangement to transport milk to a new customer. This increased the cost of hauling to the plaintiff. The defendants did allow a modest price increase by the hauler, but the plaintiff still could not profit from this business.<sup>244</sup> Although the case is more important for its discussion of predatory practices, there is strong language concerning monopolization as a legitimate goal.<sup>245</sup> The court indicated that monopolization by

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<sup>240</sup> See 512 F. Supp. at 632. See also Comment, *supra* note 7, at 91 ("[I]f the refusal to deal is accompanied by any motive to restrain trade, the Court will require commercial motive, business pattern, and 'reasonable' conduct to uphold the practice. As a general rule the cooperative should have a strong and valid reason when it refuses to deal."). But see *id.* ("Even a simple refusal to deal may not be tolerated when an examination of the market context is made, even though the refusal has some justification.").

<sup>241</sup> See *GVF Cannery, Inc. v. California Tomato Growers Ass'n*, 511 F. Supp. 711, 716 n.1 (N.D. Cal. 1981) (citing *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods*, 497 F.2d 203, 215 n.9 (9th Cir. 1974)).

<sup>242</sup> See generally *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (refusal to deal as a mechanism to enforce territorial limitation plan).

<sup>243</sup> 1983-2 Trade Cas. (CCH) ¶ 65,595, at 68,966 (6th Cir. July 20, 1983). The case was not recommended for full-text publication. "Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on the other parties and the Court." *Id.* Despite the prohibition against publication, the case merits discussion.

<sup>244</sup> See *id.* at 68,967-68.

<sup>245</sup> "This near monopoly status is precisely what the Capper-Volstead Act makes lawful, and it would not be unlawful even if defendant controlled 100% of the farmers." *Id.* at 68,969.



itself cannot be considered a predatory trade practice.<sup>246</sup> The plaintiff was coerced into accepting the arrangement because the cooperative had eighty to eighty-five percent of the farmers in the area as members.<sup>247</sup> Given the lawful nature of these cooperatives, however, this coercion is lawful.<sup>248</sup>

In *L. & L. Howell*, the conduct under examination was the cooperatives' refusal to pay more for the plaintiff's hauling services.<sup>249</sup> In finding the defendant's actions lawful, the court focused its attention upon the objective of the allegedly predatory acts.<sup>250</sup> There was no evidence that the cooperatives wanted to eliminate competition among haulers. The cooperative did not haul milk and there was no evidence of an intent to do so in the future.<sup>251</sup> The court described this act as a benefit to the cooperative's members rather than a predatory practice against a competitor.<sup>252</sup> Additionally, there was no evidence that the cooperative desired to extend its monopoly powers through the low price paid to the milk haulers.<sup>253</sup>

A similar issue involving milk haulers is the scope of the Capper-Volstead Act exemption to those who "handle" agricultural products.<sup>254</sup> In *Green v. Associated Milk Processors*,<sup>255</sup> the court held that "handle" includes the hauling of milk,<sup>256</sup> saying it is a central function of a milk cooperative to ensure that the transportation of milk occurs properly.<sup>257</sup> The plaintiff argued

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<sup>246</sup> See *id.*

<sup>247</sup> See *id.*

<sup>248</sup> See *id.* This analysis is weakened since there are other reasons that the cooperative's practices were not predatory. See notes 249-53 *infra* and accompanying text.

<sup>249</sup> See 1983-2 Trade Cas. ¶ 65,595, at 68,968. The cooperatives' monopolization of the hauling area was not considered predatory since the monopolization was to achieve legitimate goals of the cooperative. See *id.* at 68,969.

<sup>250</sup> See *id.* at 68,969.

<sup>251</sup> See *id.*

<sup>252</sup> See *id.* Supporting this proposition, the court noted that the cooperative was legally able to contract with a different hauler. Also, the plaintiff was under no compulsion to accept an unfavorable contract. See *id.* at 68,969-70.

<sup>253</sup> See *id.* at 68,969.

<sup>254</sup> Section 1 of Capper-Volstead exempts those persons engaged in the processing and "handling" of agricultural products from the reach of the Sherman Act. 7 U.S.C. § 291 (1982).

<sup>255</sup> 692 F.2d 1153 (8th Cir. 1982).

<sup>256</sup> See *id.* at 1157.

<sup>257</sup> *Id.* This is due to the inherent nature of the product. It must be moved quickly and under controlled conditions to the processor in order to ensure its freshness and purity. *Id.* See also 512 F. Supp. at 624-25 (providing a brief description of milk's characteristics during hauling).

that hauling was no longer within the scope of this cooperative's legitimate activity, since the cooperative had contracted for hauling as an agent of the members and not as a cooperative.<sup>258</sup> The court described this argument as "a distinction without a difference [since] a co-op is simply a collection of member-farmers."<sup>259</sup> This analysis is reasonable since it places substance over form. This analysis could also be described as an application of the *Milk Producers Association* intent analysis, which looked into specific acts to determine whether an intent to monopolize existed.<sup>260</sup> The *Green* court merely looked into the contract to determine whether the cooperative signed as a cooperative or as an agent.

In *Holly Sugar Corp. v. Goshen County Cooperative Beet Growers*,<sup>261</sup> the court declared the normal operations of a cooperative were not predatory practices.<sup>262</sup> The cooperative, with 230 member-producers, rejected the last offer of the local beet purchaser by nearly a two-to-one vote. The members, by a three-to-one vote, then decided not to release any member from an agreement that precluded the members from making individual contracts with the purchaser.<sup>263</sup> Although the lower court found that the cooperative threatened rebel-members with suit if they contracted with the plaintiff,<sup>264</sup> the appellate court held that the plaintiff neither alleged nor proved any predatory conduct such as picketing, harrassment, coerced membership or discriminatory pricing.<sup>265</sup> There is no explanation why threats of legal action were not considered predatory acts.<sup>266</sup> Therefore, the better way to view this case is that it is a "refusal to deal" case, with the cooperative enforcing the refusal by threats of suit. In order for refusal to deal to be actionable, the refusal by a monopoly must be unjustified.<sup>267</sup> Here, there was no evidence of monopolization

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<sup>258</sup> Since the cooperative signed the hauler's contracts as the agent of the individual, the individual remained free to choose who ultimately did the work. 692 F.2d at 1157.

<sup>259</sup> *Id.* The court noted that the contract was phrased the way it was in order to avoid tort liability by the cooperatives for the acts of the haulers.

<sup>260</sup> See notes 80-84 *supra* and accompanying text.

<sup>261</sup> 725 F.2d 564 (10th Cir. 1984).

<sup>262</sup> See *id.* at 569.

<sup>263</sup> See *id.* at 566.

<sup>264</sup> See *id.* at 567.

<sup>265</sup> See *id.* at 569.

<sup>266</sup> See *id.*

<sup>267</sup> See notes 232-42 *supra* and accompanying text.

or the lack of justification.<sup>268</sup> When the case is viewed in this context, the court's holding is more reasonable.

In *United States v. Dairymen, Inc.*<sup>269</sup> the Sixth Circuit broadened the predatory practice exception to the antitrust immunity standard when dealing with charges involving attempts to monopolize and not actual monopolization.<sup>270</sup> The court recognized that the term "predatory practices" distinguishes between cooperatives gaining market power through anticompetitive practices and those gaining market power through growth.<sup>271</sup> Since the charge was an attempt to monopolize, the plaintiff was not required to show the cooperative's conduct rose to the level of predatory practices,<sup>272</sup> as the elements of an attempt to monopolize charge are different from a monopolization charge. The attempt charge requires that the defendant engage in "anticompetitive conduct with a specific intent to monopolize."<sup>273</sup> Intent is particularly important when there is economic justification for the act because even if the act has economic justification, "its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal."<sup>274</sup>

The lower court, however, did not address the issue of whether defendant's acts were made with the specific intent to monopolize.<sup>275</sup> Therefore, on remand, the appellate court instructed the lower court to determine whether there were less exclusionary means by which the defendant could achieve its goals. More importantly, the lower court was instructed to de-

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<sup>268</sup> See 725 F.2d at 566-69. "[N]either the complaint nor the record establish any violation by the association of the antitrust laws of the United States." *Id.* at 569.

<sup>269</sup> 660 F.2d 192 (6th Cir. 1981).

<sup>270</sup> See *id.* at 193.

<sup>271</sup> See *id.* at 194. The court quoted the *Milk Producers Ass'n* decision. "[T]he Capper-Volstead Act 'did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative.'" *Id.* (quoting 362 U.S. at 467).

<sup>272</sup> See *id.* The court also defined predatory practices as "anticompetitive practices without any business justifications." *Id.* Immediately before this definition, the court used the term, "i.e.," which may indicate that this definition is not exclusive. See *id.*

<sup>273</sup> *Id.* The offense of an attempt to monopolize also requires that there be "a dangerous probability that the attempt would be successful." *Id.* (citations omitted). For a discussion of the elements of a monopolization action, see note 216 *supra*.

<sup>274</sup> 660 F.2d at 194. See also notes 75-84 *supra* and accompanying text.

<sup>275</sup> See 660 F.2d at 195. The acts in question were the defendant's use of full-supply, committed-supply, and exclusive-hauling contracts. *Id.*

termine whether "these contracts were intended to stifle competition or were intended to meet legitimate business purposes."<sup>276</sup>

In determining whether the cooperative had the specific intent to monopolize, the district court incorporated all the defendant's actions, creating a whole "picture of defendant's dealings and allegedly anticompetitive practices."<sup>277</sup> While the behavior was not as culpable as picketing, harassment, boycotts, or discriminatory pricing, it was sufficient to evidence specific intent to monopolize.

The acts that gave rise to the finding of specific intent were:

(1) The cooperative had resorted to anticompetitive pooling practices in Mississippi; (2) The cooperative used illegal hauling contracts in Indiana and Tennessee; (3) There were brush fire incidents; (4) The cooperative insisted on committed or full-supply contracts; (5) The cooperative threatened supply cutoffs to the processors; and (6) Cooperative officials stated that they had been able to stop a rival's attempt to sell at competitive prices.<sup>278</sup>

This examination of conduct to determine intent was advanced initially by the *Milk Producers Association* Court when it examined the totality of evidence concerning the acquisition of that cooperative's competitor.<sup>279</sup> The court in *Dairymen* ultimately held that, although the government proved the specific intent to monopolize the market, it failed to prove that there was a dangerous probability of success in the attempt to monopolize.<sup>280</sup>

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<sup>276</sup> *Id.*

<sup>277</sup> *United States v. Dairymen, Inc.*, 1983-2 Trade Cas. (CCH) ¶ 65,651, at 69,335 (citations omitted), *aff'd*, Nos. 84-5003,84-5039, slip op. (6th Cir. Feb. 26, 1985). See note 234 *supra*.

<sup>278</sup> *See id.* But *cf.* *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 577 (10th Cir. 1961) (In determining whether an intent by the government to transcend the antitrust laws existed, the court said that it would "not lightly infer an intention to do so."), *cert. dismissed sub nom.*, *Wade v. Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962). *See* 1983-2 Trade Cas. ¶ 65,651, at 69,335. The findings of fact in this case were determined by the judge. *See id.* at 69,332. It should be noted that in a conspiracy-antitrust case, where intent and motive are important, summary judgment should rarely be given. *Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n*, 358 F.2d 115, 117 (9th Cir. 1966) (citing *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962)). A court, in deciding whether to dismiss a complaint for failing to state a claim for which relief could be granted, should be extremely liberal in construing the complaint. *See Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d at 423.

<sup>279</sup> *See* notes 80-84 *supra* and accompanying text.

<sup>280</sup> 1983-2 Trade Cas. ¶ 65,651, at 69,335-36.

The Eighth Circuit, in *Alexander v. National Farmers Organization*,<sup>281</sup> echoed the *Dairymen* opinion's analysis of the importance of intent to achieve an unlawful goal.<sup>282</sup> The court emphasized that a cooperative's antitrust immunity is extinguished whenever it commits predatory acts.<sup>283</sup> The court also stated the immunity is extinguished when the cooperative uses lawful behavior to achieve an unlawful goal,<sup>284</sup> thus creating a new category of condemned activity, the "anticompetitive" act.<sup>285</sup> The intent to monopolize is lawful and protected under the immunity if pursued through growth only;<sup>286</sup> however, such intent becomes unlawful when its aim is "to pursue monopoly power by eliminating or restraining competition with the co-op through predatory or anti-competitive practices."<sup>287</sup> This latter form of intent is the essential element which must be proved under the *Dairymen/Alexander* analysis of the claim of attempted monopolization or conspiracy to monopolize.

*Alexander* involved a suit and counterclaim between cooperatives. The court held that National Farmers Organization [NFO] price fixing<sup>288</sup> activities were immune<sup>289</sup> from antitrust

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<sup>281</sup> See 687 F.2d 1173 (8th Cir. 1982).

<sup>282</sup> See *id.* at 1183.

<sup>283</sup> See *id.* at 1182.

<sup>284</sup> See *id.* at 1182-83. "Moreover, in reviewing an otherwise lawful dairy acquisition as part of an alleged attempt to eliminate competition, the same Court held that 'even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act.'" *Id.* (quoting *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 472 (1960)). See also notes 75-84 *supra* and accompanying text (reviewing four different fact patterns leading to violations of the Sherman Act).

<sup>285</sup> See 687 F.2d at 1183.

A cooperative may not use its position, no matter how lawfully acquired, "to stifle or smother competition." . . . Where such an unlawful intent is clear, overt acts in furtherance of this purpose are not immunized simply because they might have other justifications or because they are merely "anticompetitive" rather than "predatory."

*Id.* (quoting 362 U.S. at 463).

<sup>286</sup> See *id.*

<sup>287</sup> *Id.*

<sup>288</sup> The trial court had held that the National Farmers Organization's [NFO] acts did not constitute price fixing. *In re Midwest Milk Monopolization Litigation*, 510 F. Supp. 381, 422 (W.D. Mo. 1981). The appellate court disagreed. See 687 F.2d at 1184.

<sup>289</sup> "The Supreme Court has construed the exemption as permitting 'farmer-producers to . . . fix prices at which their cooperative will sell their produce . . . without thereby violating the antitrust laws.'" 687 F.2d at 1184 (quoting 362 U.S. at 466).

liability due to the Capper-Volstead Act.<sup>290</sup> Other NFO activities did not violate the antitrust laws since they could not be characterized as anticompetitive practices.<sup>291</sup> The NFO's claims against the other cooperatives<sup>292</sup> were based on theories of monopolization, attempted monopolization, and conspiracy to monopolize.<sup>293</sup> The court dismissed the monopolization and attempted monopolization claims since the NFO could not show a relevant market where the rival cooperatives had achieved monopoly power or a "dangerous probability" of that power.<sup>294</sup>

The appellate court, however, accepted the conspiracy to monopolize claim,<sup>295</sup> stating the critical issue was whether the NFO had shown an intent by the defendants "to pursue [monopoly] power or seek to eliminate competition through predatory, anticompetitive or other unlawful tactics."<sup>296</sup> In determining whether this intent existed, the appellate court held it was erroneous for the trial court to view the defendants' acts as "isolated, self-contained actions."<sup>297</sup> Rather, it is "the actual conduct viewed as a whole—which establishes the unlawful conspiracy."<sup>298</sup>

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<sup>290</sup> See *id.* At issue was whether the NFO qualified as a Capper-Volstead cooperative. The court held that the organizational splintering of the NFO did not preclude Capper-Volstead status. See *id.* at 1184-85. Additionally, the decision in *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978), did not create a strict prohibition against nonfarmer cooperative members where, as with NFO, food processors were not members of the cooperative. See *id.* at 1185-87.

<sup>291</sup> See 687 F.2d at 1187-88. NFO did solicit members from rival cooperatives but the court appears to have characterized this as normal business operations. See *id.* at 1187. To condemn this practice would be to use the antitrust laws as a barrier to market entry. See *id.* at 1188. NFO's boycott was within the scope of the Capper-Volstead Act since the boycott was not directed toward eliminating competition. See *id.* An attempted monopolization claim failed because there was no showing that the NFO had a "dangerous probability" of successful monopoly. See *id.* Other conspiracy claims against the NFO failed factually. See *id.* at 1188-91.

<sup>292</sup> The other cooperatives were Mid-America Dairymen, Inc., Associated Milk Producers, Inc., Central Milk Producers Cooperative and Associated Reserve Standby Pool Cooperative. See *id.* at 1189.

<sup>293</sup> See *id.* at 1191.

<sup>294</sup> See *id.* This dismissal was affirmed since the NFO could not show a relevant market. See *id.* at 1191-92.

<sup>295</sup> See *id.* at 1192-1208. There was a sufficient showing of a relevant market. See *id.* at 1193.

<sup>296</sup> *Id.* at 1193.

<sup>297</sup> See *id.*

<sup>298</sup> *Id.* at 1194.

AMPI, Mid-Am and CMPC did conspire to monopolize and eliminate

## CONCLUSION

The *United States v. Dairymen*<sup>299</sup> and the *Alexander v. National Farmers Organization*<sup>300</sup> decisions represent a departure for the courts from the traditional predatory acts analysis in determining the scope of the Capper-Volstead Act. Neither case cited specific policy reasons for this departure; nonetheless, by denying immunity for lawful acts in pursuit of an unlawful goal, each implicitly recognized the changes in the structure and purpose of agricultural cooperatives. In addition, while the court in *Fairdale I* did not consider the changing agricultural economy, that court did recognize that Congress may want to reconsider the policy underlying the Capper-Volstead Act.<sup>301</sup>

Both to clarify the scope of the Acts and to address the current agricultural economy, Congress should reconsider the policy embodied in section 6 of the Clayton Act and in the Capper-Volstead Act. As evidenced by the courts' reliance upon legislative history, the statutes' words provide little help in their interpretation. That history, however, has created only uncertainty about the scope of the statutes. Uncertainty also remains as to whether the Sherman Act even applies to agricultural cooperatives since that issue has never been decided by the Supreme Court. It was merely the fear of its application which prompted Congress to provide the statutory immunities.

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competition in the marketing of Grade A milk produced in the Midwest, through the use of discriminatory pricing, coercive supply disruptions and threats of similar conduct, as well as bad faith harassment and threats of litigation against independent buyers of NFO milk.

*Id.* at 1193. *See also id.* at 1195-1207 (details of the defendants' actions in this conspiracy).

<sup>299</sup> 660 F.2d 192 (6th Cir. 1981).

<sup>300</sup> 687 F.2d 1173 (8th Cir. 1982).

<sup>301</sup> *See Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1045 n.7 (2d Cir. 1980) (*Fairdale I*), *cert. denied*, 454 U.S. 818 (1981).

There are those who contend that the economics of farming have changed so drastically in recent years through farm growth and mechanization that the Capper-Volstead Act is no longer needed to equalize bargaining power. . . . It is for Congress, not the courts, to determine whether there is sufficient merit in this argument to warrant a redesign of the statute.

*Id.* (citing Note, *supra* note 4, at 381-89). *Cf. Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 354-55 (1982) (suggesting that policy arguments concerning application of a per se rule should be directed to Congress, not the Court, since "Congress may consider the exception that we are not free to read into the statute").

More important than the legal questions surrounding the scope of these immunities is the effect of the change in agriculture since the enactment of the Capper-Volstead Act sixty-three years ago. Whether the change is a sufficient rationale to modify agricultural antitrust policies is beyond the scope of this Note and is best left to experts and Congress. What is certain, however, is that enough change has occurred to prompt some courts to narrow the scope of the immunity, and others to appear uncomfortable about applying a 1920s immunity to 1980s economic reality.

Congress needs to provide guidance for the courts in this complex area of the law. Courts either need assurance that the Capper-Volstead Act (and its case history) embodies current congressional intent or that a modified statute represents good policy for the future. Congressional action would ensure reliance upon the congressional will rather than upon conflicting statutory purposes, conflicting legislative intent and conflicting options.

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